87-1699

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

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GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL,

Appellees.

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On Appeal from the Supreme Court
of the State of Texas

*

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

Whether Texas' sanctions' rule, Rule 215, Texas Rules of Civil Procedure, as written - permitting as it does the dismissal with prejudice of lawsuits for alleged discovery abuses, even where there has been no violation of a prior discovery order, no allegation or showing that any of the answers to the interrogatories were "unreasonably frivolous", no allegation or showing of bad faith or contumacious conduct on the part of the parties or their counsel, no allegation or showing of prejudice to the complaining party and no resort to lesser sanctions, and even though there has been a good faith effort to comply with the discovery requests - is contrary to the Fifth and Fourteenth Amendments, as well as possibly other Amendments, to the Constitution of the United States.

II.

Whether Rule 215, as applied in this case, violated the Fifth and Fourteenth Amendments to the Constitution of the United States and the due process and equal protection rights of the Appellants, when it is considered that the Texas state district court utilized such rule to apply the drastic and ultimate sanction of dismissal with prejudice even though it is undisputed that: (1) Appellants had not violated any prior discovery order of the court (indeed none had even been issued); (2) the apparent basis for sanctions involved the failure to answer three out of 57 interrogatories submitted by Appellees and Appellants swore (without contradiction) that they did not know the answer to two of the three interrogatories and the third was answered before the sanctions hearing was held; (3) there was no allegation or showing that the answers to any of those three interrogatories were

"unreasonably frivolous"; (4) no prejudice (such as lost evidence) was suffered by Appellees as a result of Appellants' delay in answering the interrogatories; (5) a reasonable explanation was given for the delay in answering the interrogatories and for not knowing the answers to two of them; (6) the delay in answering the interrogatories resulted in no delay in the proceedings because the case had never been set for trial and was not set for trial when the state district court dismissed; (7) the state district court arbitrarily refused to consider lesser, more appropriate sanctions (if any were justified at all), in lieu of stripping away the Appellants' right to their day in court forever; (8) there was no allegation or showing that the Appellants themselves (as distinguished from counsel) were at any fault with respect to the interrogatories in question; and (9) there was no allegation or showing of bad faith

or contumacious conduct on the part of Appellants or their counsel.

III.

The State of Texas having provided a right of appeal to an intermediate court of appeals, with review by the court of lost resort (the Supreme Court of Texas), whether the Texas appellate courts' refusal to consider the appeal in this case on its merits, because no transcript of the hearing on sanctions before the state district court was filed with the appellate courts, violated the Appellants' rights to due process and equal protection of the laws under the Fifth and Fourteenth Amendments and other provisions of the Constitution of the United States, because of the undisputed facts that: (1) a complete record of all matters filed in the state district court (including the interrogatories in question and answers thereto; the pleadings; motions for

sanctions; responses; and all orders and judgments of the court) was timely filed with the state appellate court; (2) the pleadings (motions for sanctions), on the basis of which sanctions were sought, did not, on their face, justify the drastic sanction of dismissal with prejudice; (3) the Appellees' briefs before the Texas appellate courts did not disagree with the Appellants statement of the essential facts[1]; and (4) the transcript of the hearing on sanctions was wholly unnecessary to a disposition of the merits of the appeal.

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1. Texas has a rule, 74(b) of the Texas Rules of Appellate Procedure (T.R.A.P.), see text under Statutory Provisions, which provides for acceptance as correct, by the state appellate courts, assertions of facts by appellants not challenged by the appellees.

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GARY ELLIOTT, Individually
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Appellees.

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On Appeal from the Supreme Court Supreme
of the State of Texas

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JURISDICTIONAL STATEMENT

Appellants Gary Elliott, Individually and as Next Friend of Shauna Marie Elliott, A Minor, seek review of a decision of the Supreme Court of Texas affirming a dismissal of appellants'

medical malpractice case with prejudice[2].

OPINIONS BELOW

The action of the Supreme Court of Texas, denying Appellants' Motion for Rehearing dated January 4, 1988, is set forth in Appendix A. The opinion of the Supreme Court of Texas, which is in the form of a denial of a writ of error, with the notation, "no reversible error (n.r.e.)", dated November 18, 1987, is set forth in Appendix B. The judgment of the state court of appeals, dated August 13, 1987, is set forth in Appendix C. The order overruling the Appellants' motion for new trial, entered by the state district court on August 25, 1986, is set forth in Appendix D. The judgment of the state district court dismissing with prejudice Appellants' case in the state district court, dated June 13, 1986, is

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2. The names of all parties in the proceedings below are included in the caption of the case.

set forth in Appendix E. All of the opinions of the state courts of Texas were unpublished.

JURISDICTION

This is an appeal from a final judgment dismissing Appellants' medical malpractice case with prejudice under and pursuant to the state courts of Texas' discovery sanctions' rule, Rule 215, Texas Rules of Civil Procedure. Appellants contend that Rule 215, as written, is unconstitutional because it permits dismissal with prejudice of cases without violation of any prior discovery order; without an allegation or finding of bad faith or contumacious conduct on the part of the parties or their counsel; without a showing of prejudice to the complaining party; without a resort to lesser sanctions; and because the rule clearly extends beyond the outer limits of the constitutionality of discovery sanctions' rules as set forth by this Court in

Insurance Co. of Ireland v. Compagnie des Bauxites de Guinie, 450 U.S. 694 (1982) and Societe Internationale v. Rogers, 357 U.S. 197 (1958). In addition, Appellants contend that Rule 215, even if constitutionally valid as written, was unconstitutionally applied in this case, and that the state court of appeals unconstitutionally refused to consider the merits of Appellants' appeal on an inapplicable hypertechnicality. The Texas Supreme Court decided this case on November 18, 1987 (by virtue of its order denying application for writ of error with the notation "no reversible error") and denied Appellants' timely filed motion for rehearing on January 6, 1988. See Appendices A and B. On March 31, 1988, a notice of appeal was filed in the Texas Supreme Court; in the Court of Appeals for the Tenth District of Texas at Waco; and in 19th Judicial District Court of McLennan County, Texas. See Appendices

F-1, F-2 and F-3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect. 1257(2). See **Japan Air Line Ltd. v. County of Los Angeles,** 441 U.S. 434 (1979). Pursuant to Rule 24.4(c) of the Rules of this Court, the Attorney General of Texas was served with three copies of this jurisdictional statement.

STATUTORY PROVISIONS

The pertinent provisions of Rule 215 of the Texas Rules of Civil Procedure, provides that "a party ... may apply for sanctions or an order compelling discovery ... if a party fails ... to answer an interrogatory submitted .... [T]he discovering party may ... apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein ***without the necessity of first having obtained a court order compelling such discovery....*** For purposes of this subdivision an evasive *or* ***incomplete answer*** is to be treated as a

failure to answer .... 2b ... If a party fails to comply with proper discovery *requests* ... the court ... may ... make such orders in regard to the failure ... and among others the following: * * * (5) An order dismissing *with* or without *prejudice* the action or proceedings or any part thereof .... (Emphasis ours). For a more detailed statement of Rule 215, see Appendix Q. There are a number of provisions in the Texas Rules of Appellate Procedure (T.R.A.P.) which relate to the unconstitutional action of the Texas appellate courts in refusing to consider Appellants' appeal on the merits and they are included in Appendix R.

STATEMENT OF THE CASE

Succinctly stated, this case involves a malpractice suit brought by a surviving husband, who is in the state penitentiary, and his minor daughter for wrongful death damages arising out of the death of the wife and mother; the defendants are a Waco, Texas hospital and doctor, represented by two prominent Waco law firms; a Waco judge incredibly dismissed the case with prejudice because the plaintiffs simply did not know the answer to two of the interrogatories; and then a Waco Court of Appeals ever more incredibly refused to consider the Appellants' appeal on its merits. The rule of procedure, under which the district court dismissed, is unconstitutional on its face and/or was unconstitutionally applied and the state court of appeals' refusal to consider the appeal on its merits violated the Appellants' due process rights.

In more detail, the Transcript that was before the Texas state appellate courts

indisputably established the following procedural facts:

1. The Appellants alleged that Phyllis Elliott, then the wife of Gary Elliott and mother of Shauna Marie Elliott, a minor, was involved in an automobile accident on September 25, 1981, and was immediately thereafter carried to the Appellee Hillcrest for emergency treatment. She was placed in intensive care and thence transferred to a private room on September 28, 1981, where she died the next morning at approximately 5:00 a.m. It is Appellants' contention that Phyllis Elliott's death was proximately caused by medical malpractice on the part of Appellee Hillcrest and Appellee Lewin (Appellee Lewin was her treating doctor from the moment she entered the hospital for emergency care)(TR 10, 11).[3]

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3. Under Texas appellate court parlance, "Transcript" refers to all the pleadings, motions, responses, etc. in the case. See Rule 51, T.R.A.P. The "Statement of Facts" refers to a transcript of sworn testimony at a trial or hearing. See Rule 53, T.R.A.P.

2. On May 21, 1985, the Appellee Lewin submitted his First Set of Interrogatories to the Appellants (TR 32-37; see App. G). At the same time, Appellee Lewin filed an Amended Answer leveling a special exception to the Appellants' general allegations of negligence (TR 38). On May 25, 1985, Appellee Hillcrest submitted its First Set of Interrogatories (TR 40-48; App. H). Significantly, the interrogatories of Appellee Hillcrest are almost precisely identical to the interrogatories of Appellee Lewin.[4]

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4. For example inter. 1 of Appellee Lewin and Appellee Hillcrest inquire about the name, address, etc.; inter. 4 of Lewin and 2 of Hillcrest inquire about children information; inter. 5 of Lewin and 5 of Hillcrest inquire about employment information of the Appellants; inter. 11 of Lewin and 23 of Hillcrest inquire about felony convictions; inter. 12-16 of Lewin and 12-16 of Hillcrest inquire about identity of experts, reports and so forth; inter. 17 of Lewin and 11 of Hillcrest inquire about knowledge of relevant facts; inter. 20 of Lewin and 9 of Hillcrest inquire about doctors who had treated Phyllis Elliott; inter. 22 of Lewin and 10 of Hillcrest inquire about hospitals in which Phyllis Elliott had been a patient; inter. 24 of Lewin and 22 of Hillcrest

3. Not having received answers to the interrogatories within the time prescribed by the rules, Appellee Hillcrest, on September 27, 1985, filed a Motion for Sanctions, seeking dismissal, or in the alternative a striking of pleadings, or in the alternative attorneys fees (TR 56-64; App. I). Appellants filed answers to Hillcrest's interrogatories on October 31, 1985. (TR 56-64; App. H). Subsequently, on November 4, 1985, Appellants received a letter from counsel for Appellee Hillcrest, dated November 1, 1985, indicating that Appellees were satisfied with all answers but the answers to interrogatories 9, 10 and 22. (App. J). Interrogatory 9 asked for the names and addresses of all doctors who had examined

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inquire about allegations of specific negligence; inter. 25-27 of Lewin and 6, 20 and 21 of Hillcrest inquire about information pertaining to the parents and children of decedent and the name of the guardian of the minor plaintiff.

or treated the deceased during the ten years prior to her death and interrogatory 10 asked for the name of every hospital to which the deceased had been admitted for treatment as a patient. Appellant Gary Elliott answered interrogatory 9 by stating that he would attempt to find out the names of doctors who may have treated his deceased wife in the past (TR 59; App. H); and answered interrogatory 10 by stating that "Phyllis (the deceased wife) was admitted to the hospital for child birth and **this is the only time I know.**" (TR 60; App. H; emphasis ours). Gary Elliott answered interrogatory 22 with a general assertion of negligence (TR 63; App. H). The hearing on the Motion for Sanctions was set on a couple of occasions but did not take place in 1985 or early 1986 (See entire TR).

4. The next action reflected in the Transcript occurred when, on May 23, 1986, Appellee Lewin filed a Motion for

Sanctions similar to the Motion for Sanctions which had previously been filed by Appellee Hillcrest, requesting dismissal, or in the alternative striking of the pleadings, or an order compelling answers to interrogatories, or, alternatively, attorney fees (TR 65-67; App. K). On June 4, 1986, though the Appellants had reasonably deemed answers to Appellee Hillcrest's interrogatories to be tantamount to a response to interrogatories of both Appellees since they were virtually identical, Appellants nevertheless filed answers to Appellee Lewin's interrogatories. (See answers to interrogatories, TR 71-77; App. G). It is significant to note that the Appellee Lewin at no time prior to the eventual dismissal of this case made any complaint or contention that any specific interrogatory answer furnished by the Appellants was inadequate (see entire TR).

5. Some of the answers given by the Appellants to the interrogatories of Appellee Lewin are significant. For example, Gary Elliott stated that he had been incarcerated in the Texas Department of Corrections from 1981 to the (then) present time (answer to inter. 2; TR 71; App. G); he also stated, in response to inter. 20, that Dr. Lewin "is the only physician that I have knowledge of that (ever) examined Phyllis" (TR 74; App. G); and in answer to inter. 21, he responded that the only hospital that Phyllis Elliott had ever been in, other than Hillcrest, was the hospital in which she gave childbirth and that "I do not know the name of that hospital" (see answers to inter. 21 and 22, TR 75; App. G). These statements were never contradicted by the Appellees at any time throughout the proceedings and, therefore, it is undisputed that Gary Elliott did not have, within his knowledge, the names or addresses of

any doctors or hospitals that may have treated Phyllis Elliott prior to the car wreck in question and the treatment by Appellees.

6. The hearing on the Motion for Sanctions of both Appellees was set for June 13, 1986. At that time, the case had not been set for trial and no pre-trial order had been entered prescribing deadlines for discovery. At that time, no prior discovery order had been requested or entered. At that time, no hearing had been requested or conducted or an order entered to determine whether Appellants should be compelled to further answer interrogatories 9, 10 or 22, even though Appellants had in good faith answered that they did not know the answers to Nos. 9 and 10 and that an answer to No. 22 was premature.

7. At the time of the sanctions hearing, the only motions for sanctions on file which could provide a basis for any

sanctions were the one and only motion each of the Appellees' filed. (See App. I and K). Both were almost identical and were stated in very general terms. They were both filed *before* the respective sets of interrogatories were answered by Appellants. They were both *not* amended after the answers to interrogatories were filed, in order to reflect the situation as it was at the time of the hearing (e.g., the motions alleged no answers had been filed when in fact answers had been filed to all 57 interrogatories). And both focused on the erroneous assumption that no answers had been filed without specifying any other ground for imposing sanctions. The motions contained ***no allegations*** that: the answers filed were inadequate; *or* that any answers were "unreasonably frivolous"; *or* that there was any intentional delay in answering the interrogatories; *or* that Appellees had been prejudiced in any way by the delay in receiving the answers;*or*

that Appellants or their attorneys were guilty of bad faith or contumacious conduct or even of negligence in connection with the interrogatories. In short, the motions for sanctions contained no allegations justifying *any* sanctions except perhaps attorneys fees and they certainly did not justify the ultimate sanction of dismissal with prejudice (id., App. I and K).

8. Counsel for Appellants requested that the sanctions hearing be postponed to another date because the only counsel for the Appellants (the undersigned counsel) was in trial in another court (TR 91). Counsel for Appellees refused such postponement and, therefore, counsel for the Appellants had to send a young attorney from Houston (Ms. Ashley), to the hearing in his place. As she stated in her affidavit attached to Appellants' Motion for New Trial (TR 91; App. N), when she arrived at the hearing she was presented with an affidavit by the

attorney for Appellee Hillcrest concerning the alleged procedural history of the case, which was ordered filed, but that no evidence was offered at the hearing. (id. TR 91; App. N).

9. Appellants filed, prior to the hearing on the motions for sanctions, a written response to said motions (TR 78, 79; App. L). In that response Appellants pointed out to the district court the difficulties that Appellants had experienced in completing the answers to interrogatories because of the fact that Mr. Elliott was in a penal institution and counsel for Appellants had been unable to establish any "direct contact with relatives and/or in-laws" (TR 78; App. L) and how these circumstances had made it difficult to obtain the answers to the interrogatories about Phyllis Elliott's past medical history. The Response went on to point out that the Appellants did not have medical records of any other treatment or confinement other than the

treatment and confinement involving the automobile accident (TR 78; App. L). The Response further indicated that Appellants would provide the Appellees with a release or a medical authorization so that they could obtain any documents they wanted through their own efforts (TR 78; App. L). In addition, attached to the Response were notices of depositions of Dr. Lewin and the nurses of Hillcrest Hospital who were in attendance to the decedent prior to her death (TR 80, 81; App. L). And the Response stated that following those depositions the Appellants would provide the names of the Appellants' expert witnesses within sixty days and thence make such witnesses "available to you for depositions" (TR 79; App. L). Appellants also stated that they would be ready to go to trial after such discovery was completed "at the convenience of the Court" (even though the trial court had never set the case for trial, established any discovery deadlines, or indicated when it would set the case for trial), the Appellants requesting only "sufficient notice so as

to facilitate the issuance of a bench warrant for client" so that he could be temporarily released from the penitentiary for appearance at the trial. (App. L).

10. Appellants also filed, prior to the hearing on the motions for sanctions, a Supplemental Answer to Interrogatory 22, listing specific acts of negligence to the best of Appellants' ability to do so, in the light of the information then available. (TR 78, 79; App. M). Moreover, the Appellees did not ever, though a special exception had been filed with respect to Appellants' general allegations of negligence (TR 38), attempt to have a hearing on such exception (see entire Transcript).[5]

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5. A "special exception" is the procedure under Texas rules of procedure for seeking to have the opposing party plead more specifically. See Rules 90, 91, 166, T.R.C.P. After it is filed, the burden is on the party who filed same to request a hearing on the special exception and obtain a ruling of the trial court. Such procedure, rather than through interrogatories, is the appropriate vehicle for requiring a party to plead more specifically. In fact, if Appellees had failed to have the pleadings clarified before trial they would have waived any right to complain about them. See Rule 90, T.R.C.P.

11. In addition, up to and at the time of the June 13, 1986 hearing, the Appellees had *not*, at any time prior thereto, requested or secured any discovery order of any kind; they had *not* requested or obtained an order determining whether answers 9, 10 or 22 were "legally deficient" under the circumstances; or whether any of such answers had been "unreasonably frivolous"; or whether the delay in filing the answers was intentional; and they had *not* requested or secured an order compelling answers to such interrogatories (See entire Transcript).

12. Despite the foregoing state of the record, the district court, by order signed June 16, 1986, entered a final judgment **dismissing Appellants' case with** prejudice (TR 84, 85; App. E). The judgment simply recited that the Appellants had due and proper notice of the hearing on sanctions, had resisted

"proper discovery directed to Plaintiffs" and that "the Court further finds that it should impose the sanctions authorized by Rule 215 and strike all pleadings of Plaintiffs herein, dismiss all Plaintiffs claims and causes of action herein with prejudice and render judgment that Plaintiffs take nothing from Defendants herein". (TR 84, 85; App. E). The judgment did *not* reflect any finding of bad faith or contumacious conduct; that any of the answers were "unreasonably frivolous"; that the delay in answering the interrogatories was intentional; that the delay in answering the interrogatories in any way prejudiced the Appellees; that no reasonable explanation on the part of Appellants had been made; or any ground other than, simply, that Appellants had "resisted" discovery. App. E.

13. The Appellants filed a Motion for New Trial (TR 91; App. N) which further amplified upon the above; further discuss-

ed the difficulties Appellants had in securing answers to the interrogatories; and attached thereto was the affidavit of Ms. Ashley explaining what took place at the hearing on the motions for sanctions (TR 91; App. N).

14. The district court summarily overruled the Motion for New Trial. (App. D).

The foregoing is a summary of the Transcript which was officially certified by the clerk of the state district court in this case and timely filed in the state court of appeals. This Transcript was before the court of appeals and later the Texas Supreme Court. There was no Statement of Facts before the state court of appeals or Supreme Court because there was no need for one, particularly since there was no evidentiary hearing on sanctions, except that the Appellee Hillcrest filed an affidavit.[6]

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6. The Appellees contended below that

Despite the fact that the affidavit was not a part of the Transcript,[7] the

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there were two evidentiary hearings, the hearing on the motions for sanctions and the hearing on Appellants' motion for new trial. But, at the hearing on the motions for sanctions, the only thing offered was Hillcrest's counsel's affidavit, and as stated above, Hillcrest admitted in its Brief that that affidavit did not contradict the material procedural facts stated by Appellants in their Brief. See App. O. The burden was upon Hillcrest to request that, any matters it deemed omitted from the Transcript that it wanted to rely upon, be included in the Transcript. See Rule 51, T.R.A.P.

At the hearing on motion for new trial, the only evidence offered was the testimony of undersigned counsel. Again, the testimony was offered on behalf of Appellants and was consistent with the Statement of the Facts in Appellants' Briefs before the state court of appeals and the Supreme Court of Texas.

If there was any "evidence" which could have been gleaned from the hearing on motion for new trial which contradicted the material facts as stated by Appellants in their Brief in the state appellate courts, or which would have been in any way helpful to Appellees, Appellees had the duty, under Rule 74(f), T.R.A.P., to point such evidence out to the appellate courts in their Briefs. They failed to do this and the explanation for such failure is obvious: the essential material facts as stated by the Appellants before the state appellate courts were absolutely correct.

7. Section 15.001 subch.A of the Texas Civil Practice and Remedies Code allows plaintiffs to sue the doctor and hospital in the county where the malpractice occurred.

state court of appeals knew that it did *not* contain anything new or material in addition to the allegations in Appellees' motions, did not contain any allegations of bad faith or contumacious conduct on the part of the Appellants or their attorneys and did not contain anything contrary to the assertion of the facts by Appellees in their Briefs before the state court of appeals. This is true because the Appellee Hillcrest stated in its Brief before the state court of appeals:

> "At the hearing (on sanctions), the attorney for Hillcrest, Roy L. Barrett, produced an affidavit signed by him outlining the procedural history of this case, ***as set out above.***" (App. D, attached to this Appeal and Appendix C before the Supreme Court of Texas; emphasis ours).

Most important, the facts stated by Appellants in their Brief before the state court of appeals and the state Supreme Court were not disputed in any ***material*** respect by Appellees. Compare statement of facts in this appeal by Appellants (which is the same as the statement of facts by

the Appellants in the Briefs before the state appellate courts) to the statement of facts by Appellees in Appellees' Briefs before the state court of appeals. See App. O and P.

The state court of appeals, as we noted above, rationalized around reviewing the merits of the district court's dismissal with prejudice by holding that, in the absence of an official "Statement of Facts", it had to presume that the state district court's actions were correct. App. C. A writ of error was timely sought in the Supreme Court and that Court summarily refused writ of error, "no reversible error", App. B, and, thereafter, refused rehearing, App. C.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Gary Elliott, one of the dispossesed of our society who is confined to a state penal institution, and his minor daughter, Shauna Marie Elliott, two plaintiffs who do not reside in Waco, Texas, have become

the victims of Texas' "home town rule". These humble people had the audacity to sue a prominent Waco doctor and a prominent Waco hospital in Waco. These Waco defendants were defended by two prominent Waco law firms. The Waco state district judge, elected in Waco, without even a semblance of fairness, extended Rule 215, Texas' sanctions' rule, beyond constitutional limits by utilizing it to strip the Appellants of all rights to have their case determined on the merits, even though Appellants had made a good faith effort, to the extent of their knowledge and ability to do so, to respond to the interrogatories in question; had not violated any prior discovery or other order of the court; Appellees had not alleged or shown any bad faith or contumacious conduct on the part of Appellants or their counsel; had not alleged or shown that any of the answers to the interrogatories were "unreasonably

frivolous"; and no prejudice had been alleged or shown by Appellees as having arisen out of the delay in receiving the interrogatory answers. Then the Waco court of appeals, also elected in Waco, also made no pretense of according due process to the Appellants. It shockingly held that it would not consider Appellants' appeal on the merits because no Statement of Facts had been filed, even though no testimony had ever been taken, a Statement of Facts was not necessary for a resolution of the appeal on its merits, the Briefs before the Waco court of appeals established that there was no dispute among the parties as to the material facts, and the pleadings in question (motions for sanctions) demonstrated, on their face, the unconstitutionality of the state district court's dismissal with prejudice. Texas' elected judges are coming under increasing criticism because of the possible impact

that large contributions by lawyers who practice before them might have upon judicial fairness and equality in the Texas state courts."

In any event, this case is an extremely important one, clearly justifying this Court's full attention. It is no secret that all courts, federal and state, are striving for greater efficiency, reduction of caseloads, elimination of frivolous cases and an overall marshalling of judicial assets toward meritorious cases. Part of the outfall of this movement is the accelerating toughening of sanctions rules, particularly in the state courts, including Texas. See Kilgarlin and Jackson, *Sanctions For Discovery Abuse Under New Rule 215*, 15 St. Marys Law Journal 767 (1984). While Appellants, as we should, applaud the efforts to acheive greater judicial and docket efficiency, it

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8. In January, 1988, CBS' Sixty Minutes carried an expose' on the problem.

has now become apparent to us that many courts, particularly the Supreme Court of Texas, have, in their unbounded zeal, adopted sanctions rules that unconstitutionally give the state trial courts the power to abrogate basic due process rights of individual parties.

As we discuss, *infra*, Rule 215 allows dismissals with prejudice even though there has been an effort to comply with discovery requests, no prior order of discovery has been violated, no prejudice has been sustained by the moving party and no bad faith or contumacious conduct has been alleged or shown. Rule 215, as worded, and the application of it by the state courts of Texas in this case, clearly violates the constitutional parameters with respect to discovery sanctions set forth by this court in *Insurance Co. of Ireland v. Compagnie des Bauxites de Guince*, 450 U.S. 694, 707, 708 (1982); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 346-354 (1909); and *Societe*

Internationale v. Rogers, 357 U.S. 197, 208-212 (1958).

Since the apparent basis for the sanctions in this case involved the failure to answer two interrogatories, the answers to which Appellants simply did not know, Rule 215, and the Texas state courts' implementation of it, conflicts with this Court's holding in *Societe Internationale* to the effect that a party cannot have the ultimate sanction of *dismissal with prejudice* imposed upon it for its failure to provide discovery *on matters not within such party's knowledge or power to provide*. 357 U.S. at 208-212.

While *Compagnie des Bauxites*, *Hammond Packing* and *Societe Internationale* provide some direction to all courts concerning the due process and equal protection limitations upon the imposition of discovery sanctions, we respectfully submit that the recent rapid outward expansion of the scope of procedural rules providing for such sanctions creates a

national crisis in the form of a growing and ominous threat to the constitutional rights of those who resort to our state courts.

Moreover, the state appellate court's refusal to consider the Appellants' appeal on its merits runs counter to the rationale of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-433 (1982), to the effect that the state courts, once they adopt a judicial entitlement such as an appellate process, must implement such appellate process in a manner consistent with due process and equal protection, and other constitutional limitations.

A. Rule 215 and the Texas state courts' implementation of it violate the due process provisions of the U.S. Constitution.

Rule 215 of the Texas Rules of Civil Procedure expressly authorizes the Texas state courts to dismiss cases with prejudice even though a party has made an effort to provide the requested discovery

and has not violated any prior discovery orders. The Supreme court of Texas, in *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 320 (Tex. 1985), made clear its intention to give the trial courts virtually unbridled discretion to dismiss cases on discovery sanctions grounds. Compare the Supreme Court's opinion to that of the opinion of the state court of appeals, 689 S.W.2d 472 (Tex.App.-Houston [14th Dist] 1984).

It must be recognized at the outset that the Texas Legislature has delegated to the Supreme Court of Texas the power to write Texas Rules of Procedure and it is the Supreme Court of Texas that wrote and adopted Rule 215 in its present form. Justice Kilgarlin of the Texas Supreme Court gives us some insight into the thinking of the Supreme Court of Texas.[9]

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9. In *Downer*, the Texas Supreme Court cited Justice Kilgarlin's article with approval. 701 S.W.2d at 242.

In his article on sanctions, 15 St. Mary's Law Journal 767, he begins by pointing out that Rule 215 is only "partially patterned after its counterpart in the Federal Rules of Civil Procedure, Rule 37"; that Rule 215 "is more than an incorporation of Federal Rule 37" and "extends beyond prior Texas practice and beyond current federal practice." id., at 769. Justice Kilgarlin articulates one of the primary areas of expansion of discretion intended by the adoption of Rule 215:

> The most interesting aspect of subdivision (1) is the option given the movant to ask the court to impose sanctions on his non-complying opponent *without first obtaining a court order directing the opponent to make discovery.* Thus, the trial court is free to order sanctions in a vast category of cases in which it formerly had no such prerogative.
>
> *Before the effective date of the new rules, if the party from whom discovery was requested made some response the discovering party was necessarily obligated to move for an order to compel discovery. Only after violation of that order could the discovering party seek and the court impose sanctions.* . . .
>
> * * * * *
>
> The new Rule 215 is designed to incorporate *and extend* the holding of Lewis v. Illinois Employers Insurance

Co. [590 S.W.2d 119, 119-20 (Tex. 1979)]. In *Lewis*, the Texas Supreme Court ruled that the trial court's authorization to impose sanctions depended on the degree of compliance or non-compliance present. ***When a party responded to some, but not all, interrogatories, the interrogating party was required to move for an order compelling the interrogated party to answer. If that order was violated, the court had discretion to utilize sanctions.*** But when the interrogated party made no response, the propounding party could move immediately for sanctions. In this manner, *Lewis* distinguished between a total failure to answer an **entire set of interrogatories** and an inadequate or imcomplete response to a set of interrogatories.

The *Lewis* distinction is not perpetuated by Rule 215. Rather, the rule applicable to an absolute failure to answer interrogatories under *Lewis* **now obtains for any failure to adequately respond.** This treatment is prescribed for all forms of discovery that are initiated by action of the parties independent of the court, except for requests for admissions. **In other words, if the deposed, interrogated, or requested party does not respond sufficiently to one question or request for production, the discovering party may elect to move immediately for sanctions without first obtaining an order for discovery.** The Texas Supreme Court explains:

New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, ..."

15 St. Mary's Law Journal at 776-779; emphasis ours.

If the unconstitutional intent of the Supreme Court of Texas is not clear enough from the foregoing, the unconstitutionality of Rule 215 is sealed by these two footnotes of Justice Kilgarlin, presumably speaking for the Texas Supreme Court:

> 69. The potential impact of this new authorization of sanctions is underscored by a comparison with federal procedure. **In federal courts the general rule is that sanctions cannot be imposed until the errant party has violated a court order.** Federal Rule 37(a) provides a mechanism by which the discovering party may move the court to compel previously requested discovery. ... Violation of any discovery order activates the power of the trial court, upon motion, to decree sanctions under Rule 37(b)(2). *See* Fed.R.Civ.P. 37(b)(2); 8 C. Wright & A. Miller, Federal Practice and Procedure Sec. 2282, at 757 (1970). ... For sanctions to be available in the absence of a violated court order, the failure to cooperate with discovery must be absolute. *See* Laclede Gas Co. v. Warnecke Corp., 604 F.2d 561, 565 (8 Cir. 1979); SEC v. Research Automation Corp., 521 F.2d 585, 588-89 (2 Cir. 1975). **The situations in which the federal judges have discretion to impose**

> **discovery sanctions, therefore, are much more limited than those now open to the Texas trial judge.**
>
> 70. TEX R CIV P 215 comment. It is interesting that the Committee on Administration of Justice and the Advisory Committee suggested that sanctions be made available under Rule 215(2)(b) *only* after breach of an order commanding discovery. Instead, the Texas Supreme Court designed the scheme herein. **This is a clear indication of the court's intention to bestow broad discretionary powers upon the trial court.**

15 St. Mary's Law Journal at pp. 778, 779; emphasis ours.

Justice Kilgarlin repeatedly reaffirms the excessive hard line that will be taken by the Texas courts and essentially manifests the intention by the Supreme Court of Texas to virtually abdicate its duty of appellate review by giving the trial courts unlimited sanctions power. For example he says:

> Paragraph (2)(b) is the mainstay of Rule 215. **It is a sweeping grant of power to utilize sanctions against the parties to force discovery.** A study of this paragraph's provisions further reveals the tremendous scope of the power bestowed upon the trial court to

deal with efforts to frustrate discovery.

15 St. Mary's Law J1 at 794. Another example:

> The only alteration of the extreme sanctions provision effected by the 1984 amendments resolves a split amoung the Texas courts of appeals. Under the prior rule, it was not clear whether dismissal with prejudice was an appropriate sanction. **The new rule clarifies that uncertainty by expressly providing for dismissal with or without prejudice.** This provision represents another incident of the broadening of the trial court's power to handle discovery problems.

15 St. Mary's Law J1 at 801. And, further:

> The new rule may well have undercut a tendency of the courts to hold that the trial judge necessarily abuses his discretion when he orders dismissal or default any time the sanctioned party has made some effort to comply with the discovery requests.

15 St. Mary's Law J1 at 803.

It is clear to us that the radical action of the state district court in this case is the inevitable product of the unconstitutional powers included in the new Rule 215 and Justice Kilgarlin's and

the Supreme Court's unconstitutional interpretation of it. Justice Kilgarlin and the Texas Supreme Court have misinterpreted or chosen to ignore the constitutional limitations upon discovery sanctions imposed by this Court.[10] In *Societe International*, this Court stated:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 42 L ed 215, 17 S Ct 841, and *Hammond Packing Co. v. Arkansas*, 212 US 322, 53 L ed 530, 29 S Ct 370, 15 Ann Cas 645. **These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.** The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 USC (1952 ed.), p. 4325.
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> * * * * *

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10. Justice Kilgarlin did give lip service to the possibility of some Constitutional limitations upon Rule 215, 15 St. Mary's Law J1 at 795, 796, but he, and thus the Supreme Court, clearly failed to recognize or heed the mandate in *Compagnie* that Rule 37, as construed by the Federal courts, sets the outer Constitutional limits upon discovery sanctions' rules and their implementation. See discussion, infra.

> These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. . . . Certainly substantial constitutional questions are provoked by such action.
>
> * * * * *
>
> In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

357 U.S. at pp. 209-212; emphasis ours.

In ***Compagnie des Bauxites***, this Court articulated one of the Constitutional limitations upon discovery sanctions as being that the sanction must be "just". 456 U.S. at 707. In holding the sanction of dismissal was "just" in that particular case, the Court noted specifically that the petitioners violated "repeated orders" to provide the material requested; that petitioners had been previously "warned

... of a possible sanction"; and the proposed sanction was to be nullified if the sanctioned party were to otherwise produce information which would satisfy its burden on the issue in question. 456 U.S. at 707, 708.

Most important, this Court states in *Compagnie* that Rule 37 "embodies the standards established in *Hammond Packing Co. v. Arkansas . . .* for the due process limits on such rules". id. at 705. Under review in *Hammond Packing* was a procedural statute of the state of Arkansas. It was contended that such statute violated the Fourteenth Amendment to the U.S. Constitution because it authorized the striking of pleadings and granting of a default judgment if a foreign corporation defendant disobeyed an order to produce witnesses before a state commission. The Court held that the statute was not unconstitutional but reached that conclusion *only* because the statute was

interpreted as requiring that a prior order of discovery be violated ***before*** the sanctions could be applied and because it was also interpreted as *not* authorizing a sanction of dismissal if the party complained of had made an effort to comply with an order of discovery. 53 L.Ed.2d at 543-546.[11]

We interpret ***Hammond Packing*** as imposing the following firm Constitutional limitations upon sanction statutes or rules of the states: they must not allow the use of the ultimate sanctions (dismissal or default judgment) unless a

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11. The Court stated: "... The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power in a court to do what was done in Hovey v. Elliott was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. **Indeed, in Hovey v. Elliott, the impotency of the legislative department to endow the judiciary with the capacity to disregard the Constitution was emphasized.**" 212 U.S. at 544.

prior express discovery order of the court has been violated and the party against whom the sanctions are sought has not made a good faith effort or shown an inability to comply with such discovery order but, rather, has been guilty of bad faith or contumacious conduct in failing to comply. Since it was intended that the *Hammond* Constitutional limitations be "embodied" in Rule 37 and Rule 37, according to this Court in *Compagnie*, imposes "the due process limits upon said rules (discovery sanctions rules)", it is clear that Rule 215's plain wording - particularly as Justice Kilgarlin and the Texas Supreme Court have interpreted it - goes far beyond Rule 37 in allowing sanctions dismissals and thus is clearly unconstitutionally broad and must be struck down.[12]

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12. And in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Court upheld a Rule 37 sanction of dismissal but *only* because the district court had expressly found "flagrant bad faith" on the part of the parties sanctioned; such parties had repeatedly failed to comply with prior discovery orders; and the district court had expressly warned such parties that, if they did not comply, the case would be dismissed. 427 U.S. at 642, 643.

And even if the statute as written is not unconstitutional, most certainly the manner in which Rule 215 was applied in this case - imposing the ultimate sanction of dismissal with prejudice where the interrogated party simply did not know the answers to the two interrogatories in question; the interrogated party made a good faith effort to comply; no prior discovery order was issued or violated; no bad faith or contumacious conduct was alleged or shown; no prejudice to the complaining party was alleged or shown; and the trial court had lesser sanctions available to it but refused to consider them - violated the Appellants' due process and equal protection rights under the Constitution of the United States.

Since Rule 37 must be "strictly construed", *Salahuddin v. Harris,* 782 F.2d 1127 (2 Cir. 1986), and dismissal is permitted "only in the face of a clear record of delay or contumacious conduct by

the plaintiff(as distinguished from his counsel)", *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir., 1958) cert den. 392 U.S. 928, those limitations apply with equal force, in the Constitutional sense, to similar rules adopted by state courts.

In sum, the importance of questions concerning the constitutional limitations upon discovery sanctions rules adopted by the state courts, such as Rule 215, cannot be overstated. Some state court systems, such as Texas, have blatantly ignored the constitutional limitations placed upon sanctions rules, as articulated in *Hovey v. Elliott*, *Hammond Packing*, *Compagnie des Bauxites* and *Societe Internationale* and have plunged forward and adopted or applied such rules in such a way that, unless corrected by this Court, an untold number of litigants are destined to have their rights to a trial on the merits unconstitutionally taken away. The situa-

tion is only getting worse - not better - and the need for this Court to address such problem has now become critical.

B. The Appellants' Constitutional rights to due process and equal protection were also violated by the Texas appellate courts' refusal to consider Appellants' appeal on its merits.

This Court, in *Logan v. Zimmerman*, articulated the fundamental Constitutional mandate that when a state adopts a particular judicial scheme, such as the right of appeal to an appellate court, that appellate court must treat all parties coming before it consistent with the due process and equal protection limitations of the U.S. Constitution. 455 U.S. at 428-433. In *Logan*, the Illinois Fair Employment Practices Act (FEPA), Ill Rev Stat, ch 48, Sect. 851 et seq (1979), gave the Commission created thereunder 120 days "within which to convene a fact finding conference" at the request of a

complaining party (Logan in this case). Through no fault of Logan, the Commission scheduled the "conference" five days after the expiration of the 120-day period stated in the FEPA. His employer then moved to dismiss his complaint on the ground that the provision in the FEPA that the hearing be held within 120 days was mandatory. The Supreme Court of Illinois upheld the employer's position and Logan appealed to tnis Court, contending his due process and equal protection rights had been violated. This Court stated the issue before it:

> At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.

455 U.S. at 428.

This Court then observed that " a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause", citing ***Mullane v.***

Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and proceeded to state:

> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In Societe Internationale v. Rogers, 357 US 197, 2 L Ed 1255, 78 S Ct 1087 (1958), for example - where a plaintiff's claim had been dismissed for failure to comply with a trial court's order - the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id., at 209, 2 L Ed 2d 1255, 78 S Ct 1087. See also Hammond Packing Co. v. Arkansas, 212 US 322, 349-351, 53 L Ed 530, 29 S Ct 370 (1909)(power to enter default judgment); Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897)(same); Windsor v. McVeigh, 93 US 274, 23 L Ed 914 (1876)(same). Cf. Wolff v. McDonnell, 418 US 539, 558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). *Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their*

> *claimed right[s].*" Boddie v Connecticut, 401 US 371, 380, 28 L Ed 2d 113, 91 S Ct 780 (1971).
> * * * * *
> "'While the legislature may elect not to confer a property interest, ... *it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.* . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" Vitek v Jones, 445 US, at 490-491, n 6, 63 L Ed 2d 552, 100 S Ct 1254, quoting Arnett v. Kennedy, 416 US, at 167, 40 L Ed 2d 15, 94 S ct 1633 (opinion concurring in part).

455 U.S. at 429-430, 432; emphasis ours. This Court then held that "[what]the Fourteenth Amendment does require, however, is an opportunity (to a hearing on the merits) ... granted in a meaningful manner." id. at 437. Four members of the Court (per Blackmun J.) concluded that the FEPA deadline provision also violated the Equal Protection Clause of the Fourteenth Amendment. 455 U.S. at 438-444.

In this case, the State of Texas has provided civil litigants with a mandatory right of appeal to an intermediate

appellate court, the state court of appeals. See Rules 40, 41, 50, 51, 54 of T.R.A.P. and App. R. There is nothing in the Texas rules that requires an appellant to file a Statement of Facts in order to perfect an appeal - in fact, it is clear that the decision *not* to file, or failure to file, a Statement of Facts is *not* jurisdictional. **Rule 54(a), T.R.A.P.; Weatherell v. Weatherell**, 403 S.W.2d 524 (Tex.App.- Houston 1966); ***McEntire v. McEntire***, 706 S.W.2d 347 (Tex.App. 1986); ***DeGarcia v. San Antonio & A.P. Ry. Co.***, 77 S.W. 275 (Tex.App., writ ref'd); ***Lane v. Miller & Vidor Lumber Co.***, 176 S.W. 100 (Tex.App.- San Antonio 1915, writ ref'd); ***Glass v. Kottwitz***, 297 S.W. 573 (Tex.App.- Galveston 1927, writ ref'd); 4 Tex.Jur. 3d, Sec. 349, at pp. 479, 480, and the cases there cited; and Rule 377, T.R.C.P.[13]

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13. Indeed, Rule 53, T.R.A.P., makes it clear that the "Statement of Facts" refers to the evidence elicited at the trial on the merits. Obviously, there was no trial on the merits in this case. Rule 53(a) states that Appellant will designate to the court reporter "the portion of the

While we can understand the rule that, where a case has been tried on the merits, the evidence relating to the merits of the case will be presumed against the appellant if the appellant does not file a Statement of Facts with the court of appeals, see *The Englander v. Kennedy*, 428 S.W.2d 806 (Tex. 1968), the extension of the *Englander* rule by the state court of appeals to the facts of this case

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evidence" such Appellant deems relevant for inclusion in the Statement of Facts (Appellants deemed no "evidence" relevant to this appeal because the Transcript contained all the documents necessary to a disposition of the appeal on the merits) and 53(b) and (d) gives the other parties, including the Appellees, the right to designate whatever they want in the Statement of Facts (it is significant that Appellees did not make *any* designations). Rule 53(d) provides, if a partial statement of facts is requested, "there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal". Rule 53(e) expressly warns appealing parties that "if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal." In sum, it is clear in this case, that since there was no trial on the merits, there was absolutely no need for a Statement of Facts for the disposition of the merits of the appeal.

constituted a violation of the Appellants' Due Process and Equal Protection rights under the U.S. Constitution to have their appeal heard on its merits.

Indeed, if the Appellees were, for some remote reason, right in their contention that the Texas Rules relevant to a civil appeal can be construed to require the Appellants to file a Statement of Facts in order to have their appeal heard on its merits, then, for the reasons set forth in ***Logan*** and the cases cited therein, such rules are unconstitutional and violate Appellants' Due Process and Equal Protection rights. And even if the Texas Rules relevant to Appellants' appeal do not, on their face, violate the Due Process and/or the Equal Protection rights of the Appellants, the application of those rules and the rule in ***The Englander*** to this case, constitutes a deprivation of such Constitutional rights.

To be sure, the Texas Rules and Texas cases concerning civil appeals, establish

the following "rights" which the Appellants should, but were not, accorded the benefit of:

(1) Rule 74(f), T.R.A.P. made all material facts, necessary to decide the appeal in this case, undisputed.

Appellants stated the material procedural facts in their Briefs before the state court of appeals and the state Supreme Court (the same as stated in this Jurisdictional Statement) and the Appellees did not, in their Briefs before those courts, take issue with any of the material facts stated by the Appellants. See App. O and P. Therefore, the state appellate courts should have accepted the material facts as stated by the Appellants and thence decided the appeal on its merits.

As the Court in ***Whatley v. Whatley***, 493 S.W.2d 299 (Tex.App.-Dallas 1973) stated, in an opinion by Judge Guittard:

> Appellant suggests that we may review the trial court's ruling without a statement of facts, since we may

> accept as correct the statements in his brief which have not been challenged by appellee. He cites T.R.C.P. 419, (predecessor to Rule 74(b)) which provides: "Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by opposing party." Appellant correctly points out that appellee does not challenge the accuracy of any of the statements in appellant's brief but says only that the court has no record upon which it may overturn the decision of the trial court.
>
> In view of appellee's failure to challenge the accuracy of appellant's statement of the evidence, we shall proceed to consider the evidence as stated in appellant's brief under Rule 419. Although one purpose of this rule is to avoid casting on the appellate court the appellee's burden of searching the record to determine whether appellant's statement of the evidence is correct, it has also been applied to authorize the court to accept unchallenged statements in appellant's brief with respect to matters not included in the record.

493 S.W.2d at 301 and see authorities there cited.

Neither the court of appeals nor the Supreme Court of Texas in this case gave any reason whatsoever for not applying Rule 74(f).

(2) The appeal should have been resolved on its merits from the pleadings (motions for sanctions) because they (the motions), taken together with the rest of the Transcript, established that the Appellees' allegations did not support the sanction of dismissal with prejudice.

Another controlling rule in this case is that the state court of appeals must consider whether the pleadings (the motions for sanctions in this case) state sufficient facts to support the relief sought and/or support the judgment entered, even if there is no Statement of Facts before the Court of Appeals. *Weatherell v. Weatherell*, *supra*; *McEntire v. McEntire*, *supra*; *DeGarcia v. San Antonio & A. P. Ry. Co.*, *supra*; *Lane v. Miller & Victor Lumber Co.*, *supra*; *Glass v. Kottwitz*, *supra*; 4 Tex.Jur.3d, Sect. 349, at pp. 479, 480 and the cases there cited.

It is clear that the motions for sanctions in this case do not state facts or contain allegations sufficient to support the entry of a judgment of dismissal with prejudice. See TR 49-51 and 65-67 and App. I and K. They do not contain allegations of bad faith or contumacious conduct; or that any of the answers were unreasonably frivolous; or of prejudice to Appellees; or that Appellants had violated previously entered discovery orders; or that Petitioners had failed to attend hearings set by the court. Indeed, if anything, the motions for sanctions incorrectly state the facts because they indicate that *no* response to the interrogatories had been filed when, in fact, the Transcript indisputably establishes that responses had in fact been filed as to *all* the interrogatories and Appellees complained of only three (9,10 and 22) as being inadequate. See App. G, H and J.

Moreover, we note that Rule 215, 6 expressly directs that the proper way for the moving party to preserve anything relevant to the sanction proceedings, such as "affidavits", is to attach them to the motion for sanctions. Thus, Appellees' complaints about the absence of the Hillcrest affidavit from the record before the Texas appellate courts should have been directed to themselves - they should have supplemented their own motions by attaching the affidavit thereto, as provided for in Rule 215, 6. Had Appellees done so, the affidavit, for whatever it is worth - which is nothing in view of Appellees' statements in their briefs - would have been a part of the Transcript. Moreover, Appellees expressly admitted in their briefs filed in the Texas court of appeals, that such affidavit was consistent with their statements of the facts in their briefs, App. D, and a reading of such statements of facts establishes that they are *not* materially

different from the facts stated in this Jurisdictional Statement.

In the final analysis, the Texas court of appeals knew there was nothing in the affidavit of Hillcrest's counsel which in any way materially altered or conflicted with the undisputed procedural facts contained in the Transcript and such court knew that the ultimate sanction was not supported by the allegations in the pleadings (motions for sanctions). Therefore, such pleadings, all of which were contained in the Transcript which was before the appellate courts, *were sufficient*, on their face, to enable the court of appeals to adjudicate the appeal on its merits.

3) **Other situations in which the failure to have a Statement of Facts before the court of apeals is not fatal to consideration of the merits of the appeal.**

The general rule is that where no Statement of Facts is before the court of appeals, the case will be decided on the

basis of the Transcript; "the absence of a statement (of facts) does not affect the right to appeal". 4 Tex.Jur.3d at Sec. 336, p. 459. Of course, where a case has been tried on the merits, and the point of error in question requires an examination of the Statement of Facts in order for the appellate court to consider it, such as with respect to a claim of "insufficiency of the evidence", if there is no statement of facts before the appellate court it is only proper for the appellate court to presume that the evidence supported the judgment. *The Englander v. Kennedy.* But, even where the Statement of Facts is *not* before the appellate court, the record that is before the court, such as the Transcript, must still support the judgment. *Brown v. McLennan County Children's Protective Services,* 627 S.W.2d 390, 394 (Tex. 1982). And where, as here, there is a summary disposition, made on the basis of the matters contained in the

Transcript, the absence of a Statement of Facts creates no presumptions against the appellant, because there is no need to have before the court a Statement of Facts that contains nothing relevant to the merits of the appeal. *Foster v. Little Motor Kar Co.*, 290 S.W. 228 (Tex.App.-Dallas 1927); and see 4 Tex.Jur.3d, Sec. 349 at p. 479 and the cases there cited.

In sum, no quarrel can be made with the imposition of reasonable requirements upon parties attempting to perfect an appeal upon the merits of a civil case. But, when the state court of appeals and the state Supreme Court arbitrarily refuse to consider an appeal on a basis that "has no rational relationship to legitimate governmental objectives", see *Logan*, 455 U.S. at 444, then such appellants have been deprived of Due Process of Law and of the Equal Protection of the Laws under the U.S. Constitution. It would be ludicrous to say that the refusal by the Texas appellate courts to consider Appellants'

appeal on its merits in this case, on the ground that a Statement of Facts was not filed - where the Transcript (which was filed) indisputably contained all that was needed to enable the courts to decide the appeal on the merits - bears a "rational relationship to legitimate governmental objectives."

CONCLUSION AND PRAYER

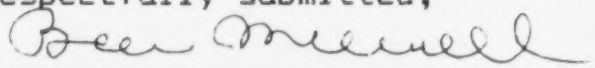
In this case, we have the sad spectacle of a minor plaintiff, too young to be of any assistance in the prosecution of her case, losing her property rights - her cause of action - simply because her father, who is confined to the state penitentiary, did not know the answer to two out of fifty-seven interrogatories. This totally blameless, faultless and innocent child, Shauna Marie Elliott, has had her constitutional right to petition the courts stripped away from her without the slightest semblance of due process of

law. The undersigned counsel begged the district judge at the very least *not* to dismiss Shauna Marie's case with prejudice. But he callously turned a deaf ear. It is clear that the most the district judge should have done is: (1) to decide whether the Appellants should be compelled to respond further to interrogatories 9 and 10, such as by ordering the Appellants, at their costs, to depose the in-laws in an effort to obtain the requested information from them (that is if they had such information; it must be remembered that the in-laws were uncooperative; they did not communicate with Gary Elliott; although compulsory process could be utilized for the taking of their depositions, there is no reason why the Appellees could not have taken such depositions on their own initiative); and (2) possibly impose attorneys fees upon counsel for Appellants since Appellees' counsel had filed motions for

sanctions during the period of Appellants' delay in filing the interrogatory answers.

The foregoing *is the most* that any reasonable, constitutionally sensitive, court conceivably could have been done, we submit, without trampling upon Appellants constitutional rights.

Respectfully submitted,



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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

87-1699

NO.

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

*

GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL.,

Appellees.

*

On Appeal from the Supreme Court
of the State of Texas

*

APPENDICES

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LIST OF APPENDICES

A. Order Texas Supreme Court overruling Appellants Motion for Rehearing.

B. Order Texas Supreme Court refusing writ of error, n.r.e.

C. Judgment of Texas Court of Appeals, affirming district court dismissal.

D. District Court Order overruling Motion for New Trial.

E. Judgment of district court dismissing case with prejudice.

F-1. Notice of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Texas.

F-2. Notice of Appeal to the Supreme Court of the United States, filed 10th Texas Court of Appeals.

F-3. Notice of Appeal to the Supreme Court of the United States, filed 19th District Court of Texas.

G. Interrogatories of Appellee Lewin and Answers thereto.

H. Interrogatories of Appellee Hillcrest and Answers thereto.

I. Appellee Hillcrest's Motion for Sanctions.

J. Letter of counsel for Appellee Hillcrest.

K. Appellee Lewin's Motion for Sanctions.

L. Appellants' response to Motions for Sanctions.

M. Supplemental answer to Interrogatory No. 22.

N. Appellants' Motion for New Trial, with attachments.

O. Excerpts of Appellee Hillcrest's brief before the Texas Court of Appeals.

Q. Rule 215, T.R.C.P. relevant portions.

R. Appellate rules, T.R.C.P., relevant portions.

APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 6, 1988.

RE: Case No. C-6889

STYLE: GARY ELLIOTT, INDIVIDUALLY AND a/n/f OF SHAUNA MARIE ELLIOTT V. DR. MARCIAL LEWIN ET AL.

ORDER

Petitioner's Motion for Rehearing of Application for Writ of Error having been duly considered it is ordered that said motion be and hereby is overruled. (Chief Justice Phillips not sitting).

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 18, 1987

Mr. Benton Musslewhite
609 Fannin
Suite 517
Houston TX 77002

Mr. Roy L. Barrett
Naman, Howell, Smith & Lee
Texas Center
P. O. Box 1470
Waco TX 76703

Ms. Susan Kelley-Claybrook
Haley, Davis, Wren, Bristow & Rasner
United Bank Plaza, Suite #300
510 North Valley Mills Drive
Waco TX 76710

RE: Case No. C-6889

STYLE: GARY ELLIOTT, INDIVIDUALLY AND a/n/f OF SHAUNA MARIE ELLIOTT v. DR. MARCIAL LEWIN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By s / Mary M. Wakefield
Deputy

APPENDIX C

AFFIRMED
AUGUST 13, 1987

NO. 10-86-176-CV

Trial Court
85-0701-1

IN THE
COURT OF APPEALS
FOR THE
TENTH DISTRICT OF TEXAS
AT WACO

*

GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF SHAUNA MARIE
ELLIOTT, A MINOR CHILD,

Appellant

v.

DR. MARCIAL LEWIN, ET AL,

Appellees

*

From 19th Judicial District Court
McLennan County, Texas

*

O P I N I O N

*

The court sanctioned the plaintiffs in this medical malpractice case by dismissing their suit with prejudice for

an abuse of discovery. The question is whether the court abused its discretion in doing so. The judgment is affirmed because, without a statement of facts or findings of fact and conclusions of law, the court is conclusively presumed to have correctly exercised its discretion.

A court's decision to impose sanctions under Rule 215 is subject to review for an abuse of discretion. **Bodnow Corp. v. City of Hondo**, 721 S.W. 2d 839, 840 (Tex. 1986); Tex. R. Civ. P. 215. The question is whether the court acted without reference to any guiding rules and principles. **Downer v. Aquamarine Operators, Inc.**, 701 S.W.2d 238, 241-42 (Tex. 1985). Stated differently, the question is whether the court acted arbitrarily or unreasonably. **Id.** at 242. An appellate court cannot substitute its judgment for that of the trial court in reviewing a sanction order. **See id.** Furthermore, abuse of discretion cannot be

c termined without a statement of facts of the sanction hearing. **See Vestal v. Jackson**, 598 S.W.2d 724, 726 (Tex. Civ. App.--Waco 1980, no writ). This is because the appellate court must presume, without a statement of facts, that the evidence supported the judgment. **See Englander Co., Inc. v. Kennedy**, 428 S.W. 2d 806 (Tex. 1968).

Plaintiffs-appellants argue under their first point that the court erred when it failed to find that the answers to three interrogatories were deficient or to specify how the answers were deficient. This complaint is rejected because, without findings of fact or conclusions of law in the appellate record, all findings necessary to support the judgment are implied on appeal. **See Burnett v. Motyka**, 610 S.W. 2d 735, 736 (Tex. 1980). They also complain that the court imposed the most drastic sanction available to it without ever having entered an order

compelling discovery. Rule 215 expressly authorizes the court to sanction a litigant although no order has ever been entered to compel discovery. **See** Tex. R. Civ. P. 215, 1. b; **see also** Kilgarlin & Jackson, **Sanctions for Discovery Abuse Under New Rule 215**, 15 St. Mary's L.J. 767, 776 (1984). Plaintiffs-appellants also argue several evidentiary matters that cannot be determined without a complete statement of facts. These include contentions that the evidence showed: (1) they had "good cause" for answering the interrogatories the way they did; (2) they had made a "good faith effort" to answer the three interrogatories; (3) they had a "reasonable explanation" why the three interrogatories could not be more completely answered; (4) they had not acted willfully, in bad faith or with gross negligence; and (5) defendants had

failed to show harm. Without a complete statement of facts, this court must presume that the evidence was sufficient to support the judgment. **See Englander Co., Inc.**, 428 S.W.2d at 806-07. Point one is overruled.

The second point is that the court acted unconstitutionally when it imposed sanctions. Rule 215, which provides for notice and a sanction hearing, guarantees the essence of due process. **See** Tex. R. Civ. P. 215, 1., d. Additionally, the holding in **Ins. Corp. of Ireland v. Compagnie des Bauxites**, 456 U.S. 694 , 102 S. Ct. 2099, 2107, 72 L. Ed. 2d 492 (1982), requires the sanction decree to be just and be specifically related to the harm done by the condemned conduct in order to pass muster under due process. **See** 15 St. Mary's L. J. at 795-96. This means that in the circumstances of the particular case the trial court did not abuse its discretion and that the sanction

was tailored to redress the prejudice to the other party. **See id.**

The record reflects that plaintiffs-appellants were given notice of and participated through counsel in the sanction hearing. Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants. **See Englander Co., Inc.**, 428 S.W.2d at 806-07. Point two is overruled.

Affirmed.

BOB L. THOMAS
Justice

DO NOT PUBLISH

APPENDIX D

DISTRICT COURT FEE SYSTEM
CIVIL DOCKET SHEET

DATE: 02/18/88
TIME: 15:00:56

COURT NO: 1
CAUSE NO: 85-0701-1
ACTION NO: 01
FILE DATE: 02/15/85

ELLIOTT VS DR LEWIN & H B M C

PARTIES TO CASE

01 ELLIOTT, GARY
02 LEWIN, DR MARCIAL ET AL
03 HILLCREST BAPTIST MED CENTER

ATTORNEY

P 03 MUSSLEWHITE, BENTON
D 02 WREN, JAMES E
D 01 BARRETT, ROY

DATE	PARTY		COURT PROCEEDINGS
8/28/86	01	A	ORDER OVERRULING MOTION FOR NEW TRIAL

APPENDIX E

NO. 85-0701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR	]	IN THE DISTRICT COURT
	]	OF
V.	]	
	]	McLENNAN COUNTY, TEXAS
DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER	]	
	]	19TH JUDICIAL DISTRICT

JUDGMENT

ON THE 13TH DAY OF JUNE, 1986, in the above numbered and entitled cause, wherein Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, are plaintiffs and Dr. Marcial Lewin and Hillcrest Baptist Medical Center are defendants, came on to be heard the Motions for Sanctions under Rule 215, Texas Rules of Civil Procedure, of both said defendants against plaintiffs, and came plaintiffs by and through two attorneys who represented to the Court that they were authorized and requested by

counsel of record for plaintiffs to appear on behalf of plaintiffs at said hearing, and came defendants by and through their counsel of record herein, and announced ready for hearing on the Motions for Sanctions by said defendants.

The Court, having heard the evidence and considered the pleadings, affidavit, motions for sanctions filed by both defendants, and proper notice from both defendants of said hearing, and further finds that plaintiffs have abused the discovery process, as set forth in the Texas Rules of Civil Procedure, by resisting proper discovery directed to plaintiffs herein as fully established by the record before the Court at said hearing, and the Court further finds that it should impose the sanction authorized by Rule 215 and strike all pleadings of plaintiffs herein, dismiss all plaintiffs' claims and causes of action herein with

prejudice and render judgment that plaintiffs take nothing from defendants herein.

It is, therefore, ORDERED, ADJUDGED and DECREED that the pleadings of plaintiffs herein against both both defendants are in all things stricken.

It is, further, ORDERED, ADJUDGED and DECREED that all claims and causes of action of plaintiffs, Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, against defendants, Dr. Marcial Lewin and Hillcrest Baptist Medical Center, are hereby in all things dismissed with prejudice and it is the judgment of the Court that plaintiffs take and recover nothing herein against defendants.

It is, further, ORDERED, ADjUDGED and DECREED that all costs of court incurred herein are taxed against plaintiffs for which execution shall issue.

SIGNED this 16th day of June, 1986.

DISTRICT JUDGE

APPENDIX F-1

IN THE SUPREME COURT
OF THE STATE OF TEXAS

*

NO. C-6889

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners Gary Elliott, Individually and As Next Friend of Shauna Marie Elliott, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Supreme Court of Texas in the above-captioned case, entered on November 18, 1987, denying application for Writ of Error, No Reversible Error, and on January 6, 198i, denying Petition for Rehearing. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Sect 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA # 14752000

Attorney for Appellants

Date: March 29, 1988.

APPENDIX F-2

IN THE COURT OF APPEALS
FOR THE TENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT WACO

*

NO. 10-86-176-CV

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

VS.

DR. MARCIAL LEWIN, ET. AL.

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners GARY ELLIOTT, Individually and As Next Friend of SHAUNA MARIE ELLIOTT, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Court of Appeals of Texas, affirming the dismissal by the Stae District Court entered on August 13, 1987. The jurisdiction of the Supreme Court of the United States is

invoked pursuant to 28 U.S.C. Sect. 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA # 14752000

Attorney for Appellants

Date: March 29, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 29th day of March, 1988.

BENTON MUSSLEWHITE

APPENDIX F-3

IN THE DISTRICT COURT
OF McLENNAN COUNTY, TEXAS
19TH JUDICIAL DISTRICT

*

NO. 85-0701-1

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR
VS.
DR. MARCIAL LEWIN, ET. AL.

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners GARY ELLIOTT, Individually and As Next Friend of SHAUNA MARIE ELLIOTT, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Texas District Court in the above-captioned case, entered on June 13, 1986, entering judgment of dismissal with prejudice and on August 28, 1986, overruling the Plaintiffs' Motion for New Trial. The jurisdiction of the Supreme Court of the

United States is invoked pursuant to 28 U.S.C. Sect. 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA# 14752000

Attorney for Appellants

Date: March 29, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 29th day of March, 1988.

BENTON MUSSLEWHITE

APPENDIX G

NO. 85-701-1

GARY ELLIOTT, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D.	]	19TH JUDICIAL DISTRICT

FIRST SET OF WRITTEN INTERROGATORIES TO GARY ELLIOTT

Pursuant to the provisions of Rule 168, Texas rules of Civil Procedure, the following interrogatories are submitted by Defendant Marcial Lewin, M.D., to Plaintiff and Plaintiff's attorney of record to be answered fully and under oath within thirty-one (31) days after service of these Interrogatories in accordance with said Rules, which period shall be deemed continuing so as to require supplemental answers if Plaintiff or Plaintiff's attorney obtains further information between the time Answers are served and the time of hearing on this

matter. The Interrogatories and the sworn Answers thereto may be offered in evidence by Defendant at the hearing on the above styled and numbered cause. In accordance with Rule 168, you are requested to answer the Interrogatories as follows:

1. Please state your full name, date and place of birth, and Social Security number.

ANSWER: Gary Michael Elliott. Born August 31, 1954, Denver, Colorado. Social Security Number 521-86-1789

2. Please state your present residence address and all previous residence addresses at which you have lived in the past five (5) years and the dates and length of residence at each location.

ANSWER: Present address is: Texas Department of Corrections, Beto Unit II, Route 2, Box 250, Palestine, Texas 75801, From February 1984 to present. Wynne Farm Unit-Huntsville, TX 77340, from November 1982 to August 1983. Eastham Unit-Lovelady, TX. From April 1981 to (over)

3. Please state where and when you have attended school and the educiational grade or degrees you have attained.

ANSWER: Rose Hill Elementary, Kearney Jr. High School, Commence City, Colorado.

El Reno High, El Reno Okla. 11th Grade - GED San Angelo, TX, High School Diploma from Windham Education School Systems.

4. If you are married or have ever been married, please state:

(a) The full name of your spouse and/r any former spouse and the date of each such marriage.

ANSWER: Nona Elliott, March 1984 to present. Phyllis Elliott 1980 to 1981. Phyllis Elliott was in a car wreck in October 1981 and died at Hillcrest Hospital, Waco, TX.

(b) Whether any such marriage has been terminated by death or divorce, including when and where.

ANSWER: The marriage to Phyllis Elliott was terminated by death.

5. Please state the name, age and present address of each of your children.

ANSWER: Shauna Elliott
206 W. 18th Street
San Angelo, TX 76902
Nine (9) years old.

6. Please state your occupation or profession.

ANSWER: Concrete Finisher and Horse Shoer.

7. If you are self-employed, please state:

(a) The name, all trade names, and the address or addresses of your business.

ANSWER: Employed by Western Geophysical during 1980 and 1981. Incarcerated in the Texas Department of Corrections, from 1983 to 1984, and as of now.

(b) How long you have been so engaged, full or part-time.

ANSWER: Presently incarcerated in the Texas Department of Corrections.

(c) Your net income from your business for each of the preceding five (5) years, and your estimated net income for this year.

ANSWER: Unknown.

8. If you are employed, other than as self-employed, please state as to each employment:

(a) The name and address of your employer and your business address if different form your employer's.

ANSWER: Incarcerated Defendant

(b) The hours and days of your duties and employment and your present rate of compensation.

ANSWER: Incarcerated Defendant

(c) The length of your employment with this employer.

ANSWER: Incarcerated Defendant.

9. If your answers to Interrogatory No. 7 and No. 8 do not fully cover your employment for the past five (5) years, please furnish the same information as to

each other employment for the preceding five (5) (years, including th annual income and reason for termination of each such job.

ANSWER: Same as No. 8.

10. Please state the source and the amount of any income which you receive other than that specificed in the answers to Interrogatory No. 7, No. 8 and No. 9 above.

ANSWER: I receive a monthly Oil Royalties check which varies in amount.

11. If you have ever been charged with or convicted of a felony, or charged with or convicted of a criminal offense involving moral turpitude, please state the nature, place, aproximate date, and disposition of each such charge.

ANSWER: Possession of marijuana (1975). Delivery of marijuana (1977). Delivery of marijuana (1984). All out of San Angelo, Tom Green County.

12. Please state the name, address, and specialization of each person you expect to call as an expert witness at the trial of this case.

ANSWER: Experts have not been selected at this time. When we have decided the experts we will use, a list will be provided for you.

13. With regard to each expert named in your answer to Interrogatory No. 12, please state the type and date of each investigation or examination by the expert of matters related to this lawsuit.

ANSWER: Experts have not been selected at this time.

14. With regard to each expert named in your answer to Interrogatory No. 12, please state whether you, your agents or attorneys have received any oral or written reports of the expert, and if so, whether each such report was oral or written.

ANSWER: Same as No. 12.

15. With regard to each expert named in your answer to Interrogatory No. 12, has such expert rendered any opinion or opinions, either oral or written, concerning this lawsuit, and if so, please state each such opinion.

ANSWER: See Answer No. 12.

16. Please state the name and address of each expert with whom you or your attorneys have consulted regarding this case and who you do not now positively aver will not be called to testify at the trial of this case.

ANSWER: See Answer No. 12.

17. Please state the names and addresses of all persons, including but not limited to experts, having knowledge of facts relevant to this lawsuit, as required by Rule 166(b) of the Texas Rules of Civil Procedure.

ANSWER: Sherry Hightower
Mountain View Unit
Route 4, Box 800
Gatesville, Texas 76528

18. Please list those sections, portions or pages of each and every book, treatise, periodical or other documet which will or may be established as a reliable authority by any expert witness to be called by you or your attorney at the trial of this cause.

ANSWER:

19. Please list each written document or tangible object which will or may be tendered into evidence by you or your attorney in the trial of this cause.

ANSWER:

20. Please state the names and addresses of all physicians, including medical doctors, osteopaths, chiropractors or any other person practicin the healing arts, who have examined, treated, or prescribed for Phyllis Elliott at the same time as or at any time subsequent to the treatment by Marcial Lewin, M.D., complained of in this lawsuit, and the dates or approximate dates that such physicians examined, treated, or prescribed for Phyllis Elliott.

ANSWER: Marcial Lewin M.D. is thonly physician that I have knowledge of that examined Phyllis Elliott.

21. Please state the name and addresses of all physicians, including medical doctors, osteopaths, chiropractors

or any other persons practicing the healing arts, who have examined, treated, or prescribed for Phyllis Elliott for any complaint or condition related in any way to the condition made the basis of this lawsuit, whether such treatment or consultation was before, at the same time as, or subsequent to the treatment by marcial Lewin, M.D., complained of in this lawsuit, and please state the dates or approximate dates that such physicians examined, treated, or prescribed for Phyllis Elliott.

ANSWER: Childbirth - I don't know name of hospital

Car accident - Hillcrest Baptist Memorial Medical Center

22. Please state the name and address of each hospital where Phyllis Elliott have ever been admitted as a patient, and the reason and approximate date for each.

ANSWER: Childbirth - I don't know name of hospital

Car accident - Hillcrest Baptist Memorial Medical Center

23. If you are making a claim for payment of medical expenses, please attach a copy of each bill upon which your claim for medical expenses is based, or please list each medical expense for which claim is being made, including the amount, the type of treatment it was for, and to whom each such medical expense was incurred.

ANSWER: I am claiming medical expenses in relationship to Phyllis Elliott's treatment from the car wreck. I don't know

the exact dollar amount but will sign a release so that you can procure the bill from the hospital.

24. With regard to the allegation made by you in the petition filed by your attorney that Dr. Lewin was negligent in the treatment of Phyllis Elliott, please state the specific facts, if any, which you and your attorney are relying upon in good faith to substantiate your claim of negligence.

ANSWER: Because of the negligent acts or omissions of the staff my wife's untimely death was caused.

25. Please state the full name of each parent of Phyllis Elliott, whether natural or adopted, and please indicate whether each such parent is living or deceased.

ANSWER: Billy Coppedge; Mattie Bolden
Living - Billy - 206 W. 18th Street, San Angelo, TX 76902
Living - Mattie - Box 293 Gail, TX 79738

26. Please state the full name and date of birth of each and every child born to or adopted by Phyllis Elliott, and please indicate whether each such child is living or deceased.

ANSWER: Shauna Elliott, born February 22, 1976.

27. Please state the present residence address of Shauna Elliott and the full name of the parent or guardian having custody of the child.

ANSWER: 206 W. 18th Street, San Angelo, Texas
Billy Coppedge is her Guardian.

Respectfully submitted,

HALEY & DAVIS, P.C.

By:
James E. Wren
Attorney for Defendant(s)
United Bank Plaza
Suite 310
510 N. Valley Mills Drive
Waco, Texas 76710
(817) 776-3336
Bar Card No. 22018200

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorney of record for each party in the above case in accordance with the Rules of Civil Procedure on this day of May, 1986.

James E. Wren

THE STATE OF]

COUNTY OF]

BEFORE ME, the undersigned authority, on this day personally appeared Gary Elliott, known to me to be the person whose name is subscribed to the foregoing answers to interrogatories and after having been duly sworn stated on [s]he oath that [s]he is the Plaintiff in the above captioned case, that [s]he has read the foregoing answers to interrogatories and that they are true and correct.

/s/
Gary Elliot

SWORN TO AND SUBSCRIBED before me by the said on this the 7th day of June, 1985.

s/ David M. Brogh
Notary Public in and for
Anderson County Texas

My commission expires
10-28-87

APPENDIX H

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
VS.	]	OF
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	McLENNAN COUNTY, TEXAS
	]	19TH JUDICIAL DISTRICT

INTERROGATORIES

TO: GARY ELLIOTT, BY AND THROUGH HIS ATTORNEY OF RECORD, MR BENTON MUSSLEWHITE, 609 FANNIN, SUITE 517, HOUSTON, TEXAS 77002.

The attached interrogatories are submitted to you under the terms and provisions of Rule 168, Texas Rules of Civil Procedure, and under the terms of that Rule you are required to answer the interrogatories separately and fully, in writing, and under oath. Your signed answers must be filed and a copy delivered to Roy L. Barrett, P. O. Box 1470, Waco, Texas 76703, within thirty-one (31) days

after the date of service hereof.

NAMAN, HOWELL, SMITH & LEE, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703
817/754-1421

BY:
Roy L. Barrett
State Bar No. 01814000

Attorneys for Defendant Hillcrest Baptist Medical Center

CERTIFICATE

A true copy of this notice and attached interrogatories has been mailed by certified mail, return receipt requested, to the above addressed attorney this 28th day of May, 1985.

Roy L. Barrett

INTERROGATORIES TO GARY ELLIOTT

For the purpose of these interrogatories, the following definitions shall aply to the terms used herein:

"Identity" or "Identify" as used in these interrogatories in reference to an individual person means to state his or

her full name and present address, and his or her present or last known employment or business affiliation.

"Occurrence in question" as used in these interrogatories means the accident or occurrence or event made the basis of this suit.

"Deceased" as used herein refers to Phyliss Elliott.

1. State your name, address, date of birth, social security number, and driver's license number.

Gary Michael Elliott #379953
Rt 2 Box 250
Palestine, Texas 75801
DB: 8-31-54
SS# 521-86-1789

2. If you are married, state the name and address of your spouse, the date of your marriage to your spouse, and the county in which such marriage occurred.

I am not married.

3. If you have ever been married previously, other than to your present spouse, please state to whom you were previously married, when and where you were previously married, and how the previous marriage or marriages ended, and when.

Phillis Elliott
Date of marriage 1980. Marriage took place at Culberson county, Van Horn. Marriage ended when Phyllis was killed in a car accident on 9-29-81.

4. If you are currently employed, state the name and address of your employer, the length of time you have been employed by such employer, your job position or duties and your wages or salary rate.

I am presently not employed.

5. For each child that you have or have had, state as follows:

(a) The name of each such dhild.

Shanna Elliott

(b) Date of birth or each such child.

February 22, 1976.

(c) Whether such child is living or deceased, and if any such child is deceased, the date of death of such child.

Living.

(d) Address of each child and marital status of each child.

206 W. 18th
San Angelo, Texas 76902

6. State the name and current address of each surviving parent of the deceased and, if either parent is deceased, state the name and date of death of each deceased parent of the deceased.

Billy Coppedge - 206 W. 18th. San

Angelo, Texas 76901

Mattie Bolden - Box 293, Gail, Texas 79738

7. State the name, age, and address of each grandchild that you have, and the name and address of each parent of each such grandchild.

None.

8. Please state the full name, last address, date of birth, social security number, and driver's license number of the deceased.

Phyliss Elliott
612 West 44th
San Angelo 76903
DOB: 4/15/58

9. State the names and addresses of all doctors, of every kind and character, who examined or treated or prescribed for the deceased during the ten years prior to the death of the deceased.

I am in the process of obtaining this information and will provide you with this information as soon as I receive it.

10. State the name and addresses of each and every hospital where the deceased was ever admitted for treatment as a patient and the approximate date thereof.

Phyliss was admitted to the hospital for child burth and this is the only time that I know.

11. State the names and addresses of each and every person who has knowledge of any facts regarding the occurrence in question, the death of the deceased, or the damages alleged in this suit.

Mattie Bolden - Box 293, Gail, Texas 79738

Billy Coppedge - 206 W. 18th, San Angelo, Texas 76901

Carol Coppedge - 206 W. 18th San Angelo, Texas 76901

12. If you, your attorney, or anyone else in your behalf, has consulted with any person holding himself out to be an expert or consultant in any field with respect to any of the issues in this case, and including any person employed by your attorney to assist him in the preparation of this case, please identify each such person by name, address, and telephone number.

None.

13. State the name and address of each expert who you do not positively aver will not be called to testify at the trial at this case and with whom you or your attorneys have consulted regarding the occurrence in question, or the cause or causes thereof, or the condition of any of the instrumentalities involved in the occurrence in question, or the condition of the scene or area where the occurrence in question occurred.

Experts have not been selected at this time. When we have decided the experts in

which we will use a list will be provided for you.

14. With respect to each expert named in your answer to the preceding interrogatory, state the area of each expert's filed of expertise and the opinions which each such expert has expressed.

As soon as experts have been selected a list will be provided to you.

15. State the name and address of each expert witness whom you or your attorney expect to call to testify at the trial of this case, and include in your response each such expert's area of expertise, the subject matter to which each such expert's testimony will relate, and the opinions to which each such expert is expected to testify.

This information will be provided to you as soon as we select our experts.

16. With respect to each expert named in your answer to the preceding interrogatory, identify by date and subject matter any reports, including factual observations and opnions, whether written or oral, prepared by each such expert witness. Please attach as exhibits any written reports, including factual observations and opinions, to your answers to these interrogatories, or state the reason or reasons why you refuse to do so.

None at this time.

17. If any photographs, videotapes, motion pictures, or any other photographic

representations have been made or taken by you or your agents or attorneys or representatives of the scene of the occurrence in question or of any of the instrumentalities, persons, or parties, involved in the occurrence in question, state as follows:

(a) The type of photographic representation made or taken, i.e. whether a motion picture, videotape, or still photographs.

None.

(b) Describe the subject matter of such photographic representation or representations.

None.

(c) Identify the person having custody, possession or control of such photographic representations.

None.

18. When and where did you last see the deceased prior to the occurrence in question?

I visited with her at the Hillcrest Hospital shortly before she died.

19. If the deceased was ever married to a person other than you, state the date of each such other marriage, the current name and address of the souse of each such other marriage, the county in which each such other mariage occurred, and how each such other marriage ended and when.

She was not married before.

20. If the deceased ever had any children, either born or adopted, state the name and current address of each such child, the date of birth of each such child, the name and address of the other parent of each such child, and whether such child is living or deceased, and if deceased, the date of death.

One child: Shanna Elliott, 2/22/76
Child is living

21. If the deceased was employed at the time of the occurrence made the basis of this suit, state the name and address of the deceased's emplyer, the period of time that the deceased had been so employed, and the deceased's wage or salary rate from such employer.

Unemployed.

22. State the specific facts which form the basis of your allegations of negligence on the part of defendant, Hillcrest Baptist Medical Center.

Because of the negligent acts or omissions of the staff, our plaintiff's untimely death was caused.

23. State whether or not the deceased had ever been, prior to the death of the deceased, convicted of or pleaded guilty to any felony or any misdemeanor criminal offense? If so, state the nature of each offense, the date of each conviction or plea, and the county in which each such conviction or guilty plea occurred.

None.

AFFIDAVIT

THE STATE OF TEXAS]
]
COUNTY OF ANDERSON]

BEFORE ME, the undersigned authority, on this dayh personally appeared GARY ELLIOTT, known to me to be ther perosn whose name is subscribed to the foregoing Answers to Interrogatories and after having duly sworn stated on his oath that he is the Plaintiff in the above captioned case, that he has read the foregoing answers to interrogatories and that they are true and correct.

GARY ELLIOTT

SWORN TO AND SUBSCRIBED before me by the said GARY ELLIOTT on this the 8 day of

October 1985.

s/Douglas Lowry

Notary Public in and for

Anderson County, Texas

My commission expires: 10/28/87

APPENDIX I

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
	]	OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D.	]	119TH JUDICIAL DISTRICT

DEFENDANT HILLCREST BAPTIST MEDICAL CENTER'S RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES defendant Hillcrest Baptist Medical Center, and makes and files this its Motion under Rule 215 andin support thereof would respectfully show the Court as follows:

1.

On May 28, 1985, defendant Hillcrest Baptist Medical Center filed its interrogatories to Gary Elliott, plaintiff, and

served same on counsel for plaintiff. Receipt of service of said interrogatories was acknowledged by plaintiff by way of return certified mail receipt dated June 3, 1985, a true and correct copy of which is attached hereto as Exhibit "A" and fully incorporated herein.

2.

On July 22, 1985, plaintiff's office contacted defendant's office and requested an additional copy of the interrogatories. In response to the plaintiff's request, defendant Hillcrest Baptist Medical Center's attorney forwarded to plaintiff another copy of the interrogatories on July 24, 1985, which is evidenced by Exhibit "B" which is attached hereto and incorporated fully herein.

3.

The originals of said interrogatories are on file in the Clerk's office among the papers in this cause together with the

requisite certificates of service. The plaintiff was required to serve his written answers to these interrogatories on or before July 5, 1985, a date more than 30 days following their service upon him. Gary Elliott has failed to serve answers to said interrogatories.

4.

As of the filing of this Motion, plaintiff has filed no response to defendant's interrogatories.

5.

In light of plaintiff's unjustified failure to respond to discovery and the flagrant abuse of the discovery process, defendant moves the Court to dismiss plaintiff's suit against defendant pursuant to the provisions of Rule 215-2b(5) of the Texas Rules of Civil Procedure.

6.

In the alternative, defendant moves the

Court to enter an order prohibiting plaintiff from introducing any evidence on the issues inquired into in the interrogatories propounded to him.

7.

The defendant further moves the Court that an order be entered refusing to allow plaintiff to support the claims or to introduce any evidence pertaining to the matters set out in Plaintiff's Original Petition or any amended petitions or supplementary petitions filed herein.

8.

Defendant alternatively moves the Court to order the plaintiff to answer the interrogatories on or before November 5, 1985 or on or before such date as ordered by the Court.

9.

In connection with this Motion, defendant moves the Court to grant defendant's costs and reasonable

attorney's fees in bringing this Motion, which were necessitated by plaintiff's abuse of the discovery process.

10.

Defendant further moves the Court for any further relief authorized by Rule 215 to which it may show itself justly entitled.

WHEREFORE, PREMISES CONSIDERED, defendant moves the Court to enter an order pursuant to the foregoing Motion and for further relief to which defendant is entitled. Defendant further prays for reasonable attorney's fees and costs of Court.

NAMAN, HOWELL, SMITH & LEE, P. C.

Texas Center
P. O. Box 1470
Waco, Texas 76703
817/754-1421

By:
Roy L. Barrett
State Bar No. 01814000

Attorneys for Defendant,
Hillcrest Baptist Medical
Center

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion Under Rule 215 has been mailed to opposing counsel this 27th day of September, 1985.

Roy L. Barrett

NOTICE OF HEARING

This is to notify you that the above Motion Under Rule 215 has been set for hearing on November 1, 1985, at 2:00 p.m. in the 19th District Courtroom in McLennan County, Texas.

Roy L. Barrett

APPENDIX J

NAMAN, HOWELL, SMITH & LEE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
TEXAS CENTER
NINTH AND WASHINGTON
P.O.BOX 1470
WACO, TEXAS 76703
(817) 754-1421

November 1, 1985

CERTIFIED MAIL NO. 562 512
RETURN RECEIPT REQUESTED

Mr. Benton Musslewhite
Attorbney at Law
609 Fannin
Suite 517
Houston, Texas 77002

Re: Cause No. 85-0701-1
Elliott v. Dr. Marcial Lewin and
Hillcrest Baptist Medical Center

Dear Mr. Musslewhite:

Due to the confusion regarding the status of the November 1, 1985, hearing, and your unavailability because of the death in your family, the Court has, at our request, cancelled the November 1, 1985, hearing on our Rule 215 Motion in the above matter and reset a hearing on the Motion for November 22, 1985, at 3:00 p.m.

We received on October 31, 1985, Answers to Interrogatories by Gary Elliott. Answers to Interrogatories numbered 9, 10 and 22 are incomplete and

insufficient.

Kindest regards.

Yours very truly,

NAMAN, HOWELL, SMITH & LEE

BY:
Roy L. Barrett

RLB:ca
cc: Judge Bill Logue
cc: Mr. James Wren
Attorney at Law

APPENDIX K

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

DEFENDANT DR. MARCIAL LEWIN'S RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Dr. Marcial Lewin, one of the Defendants in the above entitled and numbered cause and makes and files this Motion under Rule 215 of the Texas Rules of Civil Procedure and in support thereof respectfully shows unto the ourt as follows:

I.

On May 21, 1985, Defendant Dr. Marcial Lewin filed Interrogatories directed to Gary Elliott, Plaintiff in this case, and served the Interrogatories upon counsel for the Plaintiff. Receipt of the service of the said Interrogatories was acknowledged by the Plaintiff by way of return receipt for certified mail dated May 24, 1985, a true and correct copy of

the return receipt is attached hereto as Exhibit "A". A true and correct copy of the cover letter which accompanied the Interrogatories to the Plaintiff's attorney is attached to this Motion as Exhibit "B". Both Exhibit "A" and "B" are incorporated into this Motion for all purposes.

II.

The originals of the Interrogatories directed to the Plaintiff are on file in the Clerk's office among the papers in this cause along with the requisite certificate of service. The Plaintiff was required to serve his written answers to these Interrogatories on or before June 25, 1985, a date more than 30 days following their service upon him. The Plaintiff, Gary Elliott, has failed to serve answers to said Interrogatories.

III.

As of the filing of this Motion, the Plaintiff has filed no response to Defendant Dr. Marcial Lewin's Interrogatories.

IV.

Because of the Plaintiff's unjustified failure in responding to discovery, and because of the flagrant abuse of the discovery process, Defendant Dr. Marcial Lewin moves the Court to dismiss the Plaintiff's suit against him pursuant to the provisions of Rule 215-2b(5) of the Texas Rules of Civil Procedure.

V.

In the alternative and without waiving the foregoing, Defendant Dr. Marcial Lewin moves the Court to enter an order prohibiting the Plaintiff from producing any evidence on the issues inquired into in the Interrogatories propounded to the

Plaintiff.

VI.

Defendant Dr. Marcial Lewin further moves the Court that an order be entered refusing the Plaintiff to support the claims or introduce any evidence pertaining to the matter set out in the Plaintiff's Original petition or any amended petitions or supplementary petition filed herein.

VII.

In the alternative and without waiving the foregoing, Defendant Dr. Marcial Lewin moves the Court to order the Plaintiff to answer the Interrogatories propounded to him on or before July 1, 1986.

VIII.

Because of the inaction on the part of Plaintiff, Dr. Marcial Lewin has been caused to bring this Motion. Therefore, Defendant Dr. Marcial Lewin moves the Court to grant his costs and reasonable

attorney's fees in bringing this Motion, which were necessitated by the Plaintiff's abuse of the discovery process.

IX.

Defendant further moves the Court to grant him any relief authorized by Rule 215 of the Texas Rules of Civil Procedure, to which he may show himself entitled.

WHEREFORE, PREMISES CONSIDERED, Defendant moves the Court to enter an Order pursuant to the foregoing Motion and for such further relief which Defendant Dr. Marcial Lewin is entitled. Defendant further prays for reasonable attorneys' fees and costs of court.

Respectfully submitted,

HALEY, DAVIS, WREN,

BRISTOW & RASNER

James E. Wren
Attorney for Defendant
Dr. Marcial Lewin
510 North Valley Mills,

Ste. 300
Waco, Texas 76710
(817) 776-3336
Bar Card No. 22018200

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorney of record for each party in the above case in accordance with the Rules of Civil Procedure on this 22nd day of May, 1986.

James E. Wren

APPENDIX L

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
VS.	]	McLENNAN COUNTY,TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANT HILLCREST BAPTIST MEDICAL CENTER RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, and makes and files response to Defendant, Hillcrest Baptist Medical Center's Rule 215 Motion and would respectfully show the Court as follows:

I.

Plaintiff's attorney as had serious problems because client is in a penal institution and has had no direct contact with relatives and/or in-laws.

II.

It has been difficult to provide the information Defendant has requested because of client's incarceration. We have endeavored to do so and have fully answered all but two (2) of the interrogatories that deal with Decedent's past medical history in the last ten (10) years.

III.

The medical history we have obtained only concerns history of the physician and hospital who attended Decedent during her pregnancy.

IV.

We will be contacting client's in-laws and will provide for release of mecial authorization if Defendant would so wish.

V.

As to prosecution of suit, John Roark, including Jeff McElroy, will be helping us to expedite this case.

VI.

We have now requested Notice of Deposition for Dr. Marcial Lewin on June 25, 1986, following the Depositions, we will provide the name of our expert witness within sixty (60) days and will make expert witness available to you for depositions.

VII.

We will be ready to go to trial after October 1, 1986 at the convenience of the Court. We will require sufficient notice so as to facilitate the issuance of a bench warrant for client.

VIII.

Based upon the foregoing it is clear that Defendant's Motion for drastic sanctions of dismissal and preclusion is inappropriate.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: s/ Benton Musslewhite
609 Fannin Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was mailed to all counsel of record on this the 13th day of June, 1986, by placing same in the U.S. mail, postage pre-paid.

Benton Musslewhite

APPENDIX M

NO. 85-701-1

GARY ELLIOTT, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

SUPPLEMENTAL INTERROGATORIES

TO: HILLCREST BAPTIST MEDICAL CENTER, by and through its attorney of record, Mr. Roy L. Barrett, of NAMAN, HOWELL, SMITH & LEE, P.C., Texas Center, P.O. Box 1470 Waco, Texas 76703.

Pursuant to the Texas Rules of Civil Procedure, the Plaintiffs have answered the Supplementary Answers to Interrogatories filed by the above-referenced Defendants and such answers are contained on the Interrogatories attached hereto and incorporated herein, by reference.

LAW OFFICES OF BENTON
MUSSLEWHITE, INC.
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

BY: s/Benton Musslewhite

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Interrogatories has been mailed to counsel of record by placing same in U.S. Mail, postage pre-paid, on this the 13th day of June, 1986.

s/ Benton Musslewhite

SUPPLEMENTAL INTERROGATORIES NO. 22

We can not give a complete answer to question until we have taken depositions of hospital personnel who attended the Decedent in hospital but, our preliminary investment indicates the following possibilities:

1. Improper treatement given by Dr. and hospital attendants to the burst fracture of C 6.

2. Failure to properly take care of breathing difficulty.

3. Admnistration of wrong drugs or wrong dosage of drugs.

4. Improper application of skull-tongs, including efforts to apply traction.

5. Failure to carry out properly suctioning procedure to eliminate secretions.

6. Given too much codeine.

7. Failure to provide needed psychological care.

8. Failure to properly respond to symptoms of possible cardiac arrest.

9. Failure to use other available means to ensure proper breathing, including possibly a tracheotomy.

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF ANDERSON

BEFORE ME, the undersigned authority, on this day personally appeared GARY ELLIOTT, known to me to be the person whose name is subscribed to the foregoing Answers to Interrogatories and after having duly sworn stated on his oath that

he is the Plaintiff in the above captioned case, that he has read the foregoing answers to interrogatories and that they are true and correct.

GARY ELLIOTT

SWORN TO AND SUBSCRIBED before me the said a GARY ELLIOTT onthis the day of , 1986.

/s/
Notary Public in and for
Harris County, T E X A S

My commission expires:

APPENDIX N

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL WITH RESPECT TO COURT'S ORDER DISMISSING PLAINTIFFS' CASES PURSUANT TO RULE 215

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause and move the Court for a New Trial, Reconsideration and Reinstatement of this cause of action and for such Motion would respectfully show the Court:

I.

This Court, on June 13, 1986, dismissed this case under the sanctions provided for in Rule 215 T.R.C.P. The Plaintiff would show that the Court erred in dismissing such case, pursuant to such sanctions

rule, for the following good and sufficient reasons:

1. Rule 215, considered together with Rule 166b and the other rules of civil procedure, establish a reasonable cut-off, with respect to Supplementation of Answers to Interrogatories, of no less than thirty (30) days prior to trial of the case on the merits. The only issues in question here are the Answer to Interrogatories 9, 10 and 22. Those supplemental answers were file on June 13, 1986 with the exception of the question of other hospitalizations of the Decedent. The surviving husband, who is now in the penitentiary, does not know the answers to that question and therefore it has been to impossible for Plaintiffs' counsel to obtain the answer to that questions. Where it is impossible for a Plaintiff to answer a question, the failure to answer such question cannot be the subject of a

dismissal under Rule 215 or any other sanctions rule. Thus, all the answers that could be filed by the Plaintiffs which respect to Interrogatories Nos. 9, 10 and 22, were filed on or before June 13, 1986 and such date was far in excess of thirty (30) days in advance of the trial of this case. Wherefore, it was error to utilize the drastic sanctions of dismissal.

2. The Court failed to utilize sanctions consistent with any urported violation. Assuming that Plaintiffs should have answered Nos. 9, 10 and 22 more fully, the failure to do so on the time schedule set by the Defendants did not justify the drastic sanction of dismissal but, at the most, justified a sanction of imposition of attorney fees. The Court erred in failing to temper the sanction to the purported violation involved. As Judge Kilgarlin of the Supreme Court pointed out

in his Article in St. Mary's Law Journal, 15 St. Mary's Law Journal 767, et seq., Rule 215 is to be construed so as to bring about, in accordance with Rule 1, the "just adjudication of substantive rights.". He points out that the main purpose of the sanctions in Rule 215 is "to insure that the abuser does not profit by his wrong and that his adversary does not suffer by it", id. 774, 775 and that the essential purpose of Rule 215 is to prevent either party from being unduly and unfairly surporsed at the trial of the case. Id. @ p. 770. That is the reason that there was written into Rule 166b, as well as into Section 5 of the Rule 215, a thirty (30) day time limit - that is providing all information requested, including answers to interrogatories, supplementation of interrogatories, designation of experts, and the like. The

Defendants have now been provided with all the information we can provide in answer to interrogatories Nos. 9, 10 and 22, and such information was provided far more than thirty (30) days in advance of the trial date.

3. The imposition of the drastic sanction of dismissal in the context of this case constitutes a violation of the Plaintiffs' due process rights, under both the Constitution of the United States and the Texas Constitution. As Judge Kilgarlin, in his St. Mary's Law Journal Article, noted:

> "Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in **Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee**, articulated due process requirements that seem applicable to discovery sanction orders in general. **Compagnie des Bauxites**, it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the

circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215(2)(b) must be made with these due process concerns in mind." id. at pp. 795-796.

Judge Kilgarlin also noted in connection with the drastic sanction of dismissal:

"These sanctions are termed the 'ultimate' or 'extreme' sanctions. It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith or due to some fault of the disobedient party (citing Societe Internationale Pour Participations Industrelles vs. Rogers, 357 U.S. 197, 212 (1958)) ... Other circumstances may call for the harsh sanction of final dismissal (or sanctions tantamount to final dismissal); but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather thanon the merits it must exercise caution". id. at pages 800 and 802.

Moreover Judge Kilgarlin stated that the Court should consider "eventual compliance with the rule ... in devising an appropriate order (imposition sanctions)".

id. @ p. 804. It is clear that this Court has unduly and unnecessarily, in violation of the due process rights of these Plaintiffs, taken away their right to have their day in court. Even if it be assumed that Plaintiff should have supplemented Answers 9, 10 and 22 in accordance with the schedule set by the Defendants, the most that this Court should have done, in imposing sanctions, is to assess attorneys fees against the Plaintiff and his attorney for the time expended by the Defendant in preparing their Motion for Sanctions and attending the hearing on sanctions.

4. Also, considering the affidavit filed by Plaintiffs' counsel and the fact that the Plaintiff himself - that is, the surviving husband - is in the penitentiary and the minor is not at this time living with him, such situation constitutes "good cause" for the failure to file answers to

Interrogatories Nos. 9, 10 and 22 prior to June 13, 1986. Therefore, the Court erred in imposing the drastic sanctions of dismissal.

5. The Court erred in imposing the drastic sanctions of dismissal because it relied upon an affidavit which was filed the date of the hearing and of which the Plaintiffs and Plaintiffs' lead counsel did not have due notice. The Court should have rejected the filing of said affidavit at the last minute and on the date of said hearing, or continued th hearing to a later date. Particularly is this true since Plaintiffs' lead counsel could not be present due to being in trial in another Court. As the affidavit attached hereto reflects, the counsel who handled the matter, Ms. Susan Ashley, was not familiar enough with the file to be able to resond to such affidavit on the spot.

It was totally unfair and lacking in due process for the Court to grant the filing of said affidavit on the date of the hearing without giving the Plaintiffs' lead counsel a chance to be there in order to respond. Such action of course not only violated the due process rights of the Plaintiffs but constituted an abuse of discretion in going forward on the basis of such an affidavit. Without such affidavit, the record in this cause is clearly insufficient to justify the imposition of the drastic sanction of dismissal.

6. For other good and sufficient reasons, your Plaintiff would show that the Court erred in imposing the drastic sanction of dismissal.

II.

Therefore, Plaintiffs respectfully request the Court to grant a new trial and

reinstate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray the Court to grant such new trial and/or reconsideration and reinstatement of this case upon the Docket.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: /s/
Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For New Trial with Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant to Rule 215 was mailed to all counsel of record, by placing same in U.S. Mail, postage pre-paid on this the 14th day of July, 1986.

/s/
Benton Musslewhite

AFFIDAVIT

STATE OF TEXAS]
]
COUNTY OF HARRIS]

BEFORE me the undersigned authority appeared Susan Ashley, known to me, and after first being sworn did upon her oath, state, swear and affirm as follows:

"My name is Susan Ashley. I make this statement of personal knowledge and of my own free will and accord. I am over twenty-one (21) years of age. I was the attorney that Mr. Musslewhite asked to attend a hearing in Waco, Texas in the case of Elliott et al vs. Dr. Marcial Lewis, et al, Cause No. 85-0701-1 on the Docket of the 19th Judicial District Court of McLennan County, Texas. At such hearing I was presented with an affidavit filed by Roy L. Barrett concernig the alleged procedural history in this case. Not being familiar with this case, and attending the hearing at Mr. Musslewhite's request because he was in trial elsewhere, I simply could not respond to such affidavit.

/s/
Susan Ashley

Plaintiff appeals from the action of the trial court dismissing the case. The record consists of the transcript only. Hillcrest objects to and challenges all references in Appellant's Brief to alleged testimony given at any hearing held in this cause, as unsupported by the record, and does not admit or agree that such alleged testimony was given or is accurately and fairly represented by plaintiff.

* * * *

APPENDIX P

EXCERPTS FROM

NO. 10-86-176-CV

*

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOT, A MINOR CHILD,

APPELLANT

V.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER,

APPELLEES

*

APPELLEE'S BRIEF

Susan Kelley-Claybrook
HALEY, DAVIS, WREN,
BRISTOW & RASNER
United Bank Plaza, Suite 300
510 North Valley Mills Drive
Waco, Texas 76710
(817) 776-3336
Bar Card No. 04334500

ATTORNEY FOR DR. LEWIN,
APPELLEE

STATEMENT OF FACTS

This case was originally file in Houston, Texas, by Gary Elliott, individualy and as next friend of the minor, Shauna Marie Elliott. The suit arose out of medical treatement that the decedent, Phyllis Elliott, received for traumatic injuries sustained in an automobile accident on September 25, 1981. Following the accident, the decedent was transported to Hillcrest Baptist Hospital where she was treated in the emergency room and then placed in intensive care. Her injuries rendered here quadriplegic and she suffered from several related conditions due to the spinal cord injury. Her death occurred early in the morning of September 28, 1981. The plaintiff brought suit against both the hospital and Dr. Marcial Lewin, a treating physician.

After motions were made by both defendants to transfer the case to McLennan County (TR. 8, 20), an agreed Order was entered and signed on march 21, 1984 (TR. 15). The record was received by the McLennan County District Clerk in May of 1985; the filing fee was not paid by the plaintiff until February 18, 1985 (TR. 26). It should also be noted that there was a substitution of local counsel for both Defendants following the transfer of the case to McLennan County (TR. 28, 31).

After filing his answer, Dr. Lewin sent by certified mail a set of written interrogatories to the plaintiff by and through his attorney (TR. 32). The return receipt indicates that the attorney for the plaintiff received said interrogatories on May 24, 1985. (TR. 65). According to the timetable set forth in Rule 168 of the Texas Rules of Civil

Procedure, Plaintiff's Answers to the Interrogatories were due on or about June 23, 1985; no response was received. On May 23, 1986, having waited eleven monts for answers to his discovery attempts, Dr. Lewin filed a Rule 215 Motion seeking sanctions against the plaintiff for his failure to comply with discovery (TR. 65). On June 4, 1986, only 9 days before the hearing date on both Dr. Lewin's and Hillcrest Hospital's Rule 215 Motions, and nearly a year after their due date, Dr. Lewin received answers to the interrogatories he had submitted in May of 1985 (TR. 71). The day of the hearing, Plaintiff sent out notices of his intention to depose Dr. Lewin; said notices were not received by Dr. Lewin until June 19, 1986. On June 13, 1986, the trial court heard both defendants' Rule 215 Motions and dismissed the case with prejudice as a sanction for discovery

abuse committed by the plaintiff against both Dr. Lewin and Hillcrest Hospital (TR. 84).

On July 15, 1986, Plaintiff filed a Motion for New Trial which was overruled by the trial court on August 28, 1986. Notice of Appeal by Gary Elliott and the Appeal Bond were filed with this Court on September 16, 1986 (TR. 95,96). The transcript was received by the clerk of this Court on September 26, 1986; thus, neither the Appeal Bond nor the transcript was filed timely.

Mr. Elliott was granted an extension of time to file the appeal bond and transcripts to the date each was actually received. Plaintiff sought, and was granted, an extension of time to file his brief, thereby changing the due date to November 12, 1986. Mr. Elliott then sought and was granted a further extension to November 19, 1986. A third extension of

time was granted to allow Plaintiff until November 25, 1986 to file his brief. Due to numerous circumstances, Plaintiff requested and was granted an additional one-day extension, and the brief was filed on November 26, 1986. Plaintiff also sought to supplement the record with the transcript of the hearing on his Motion for New Trial, but said Motion was denied by this Court and the transcript is not part of the record on appeal. Additionally, Plaintiff failed to request that the transcript of the Rule 215 Hearing be sent up on appeal and thus that hearing is also not contained in the record before this Court.

with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

* * * * * *

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the

APPENDIX Q

Rule 215. Abuse of Discovery; Sanctions

1. **Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

* * * * * *

b. *Motions.*

* * * * * *

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or ...;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

* * * * * *

2. Failure to Comply With Order or with Discovery Request.

* * * * * *

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, ... fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

Plaintiff appeals from the action of the trial court dismissing the case. The record consists of the transcript only. Hillcrest objects to and challenges all references in Appellant's Brief to alleged testimony given at any hearing held in this cause, as unsupported by the record, and does not admit or agree that such alleged testimony was given or is accurately and fairly represented by plaintiff.

* * * *

APPENDIX P

EXCERPTS FROM

NO. 10-86-176-CV

*

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOT, A MINOR CHILD,

APPELLANT

V.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER,

APPELLEES

*

APPELLEE'S BRIEF

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STATEMENT OF FACTS

This case was originally file in Houston, Texas, by Gary Elliott, individualy and as next friend of the minor, Shauna Marie Elliott. The suit arose out of medical treatement that the decedent, Phyllis Elliott, received for traumatic injuries sustained in an automobile accident on September 25, 1981. Following the accident, the decedent was transported to Hillcrest Baptist Hospital where she was treated in the emergency room and then placed in intensive care. Her injuries rendered here quadriplegic and she suffered from several related conditions due to the spinal cord injury. Her death occurred early in the morning of September 28, 1981. The plaintiff brought suit against both the hospital and Dr. Marcial Lewin, a treating physician.

After motions were made by both defendants to transfer the case to McLennan County (TR. 8, 20), an agreed Order was entered and signed on march 21, 1984 (TR. 15). The record was received by the McLennan County District Clerk in May of 1985; the filing fee was not paid by the plaintiff until February 18, 1985 (TR. 26). It should also be noted that there was a substitution of local counsel for both Defendants following the transfer of the case to McLennan County (TR. 28, 31).

After filing his answer, Dr. Lewin sent by certified mail a set of written interrogatories to the plaintiff by and through his attorney (TR. 32). The return receipt indicates that the attorney for the plaintiff received said interrogatories on May 24, 1985. (TR. 65). According to the timetable set forth in Rule 168 of the Texas Rules of Civil

Procedure, Plaintiff's Answers to the Interrogatories were due on or about June 23, 1985; no response was received. On May 23, 1986, having waited eleven monts for answers to his discovery attempts, Dr. Lewin filed a Rule 215 Motion seeking sanctions against the plaintiff for his failure to comply with discovery (TR. 65). On June 4, 1986, only 9 days before the hearing date on both Dr. Lewin's and Hillcrest Hospital's Rule 215 Motions, and nearly a year after their due date, Dr. Lewin received answers to the interrogatories he had submitted in May of 1985 (TR. 71). The day of the hearing, Plaintiff sent out notices of his intention to depose Dr. Lewin; said notices were not received by Dr. Lewin until June 19, 1986. On June 13, 1986, the trial court heard both defendants' Rule 215 Motions and dismissed the case with prejudice as a sanction for discovery

abuse committed by the plaintiff against both Dr. Lewin and Hillcrest Hospital (TR. 84).

On July 15, 1986, Plaintiff filed a Motion for New Trial which was overruled by the trial court on August 28, 1986. Notice of Appeal by Gary Elliott and the Appeal Bond were filed with this Court on September 16, 1986 (TR. 95,96). The transcript was received by the clerk of this Court on September 26, 1986; thus, neither the Appeal Bond nor the transcript was filed timely.

Mr. Elliott was granted an extension of time to file the appeal bond and transcripts to the date each was actually received. Plaintiff sought, and was granted, an extension of time to file his brief, thereby changing the due date to November 12, 1986. Mr. Elliott then sought and was granted a further extension to November 19, 1986. A third extension of

time was granted to allow Plaintiff until November 25, 1986 to file his brief. Due to numerous circumstances, Plaintiff requested and was granted an additional one-day extension, and the brief was filed on November 26, 1986. Plaintiff also sought to supplement the record with the transcript of the hearing on his Motion for New Trial, but said Motion was denied by this Court and the transcript is not part of the record on appeal. Additionally, Plaintiff failed to request that the transcript of the Rule 215 Hearing be sent up on appeal and thus that hearing is also not contained in the record before this Court.

Rule 215. Abuse of Discovery; Sanctions

1. **Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

* * * * * *

b. *Motions.*

* * * * * *

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or ...;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance

with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

* * * * * *

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

* * * * * *

2. Failure to Comply With Order or with Discovery Request.

* * * * * *

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, ... fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) *An order striking out pleadings or parts thereof, or staying*

further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default agnst the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * * * * *

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that

other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from he final judgment.

* * * * * *

3. **Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.** If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b, of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

* * * * * *

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Rule 40. Ordinary Appeal-How Perfected.

(a) Appeals in Civil Cases.

(1) *When Security is Required.* When security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. ...

Rule 50. Record on Appeal

(a) Contents. The record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts. . . ..

Rule 51. The Transcript on Appeal

(a) Contents. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include copies of the following: in civil cases, the live pleadings upon which the trial was held; in criminal

cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial and the order of the court thereon; any notice of appeal; any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond; any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; and, subject to the

provisions of paragraph (b) of this rule, any filed paper any party may designate as material.

* * * * * *

(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. ....

Rule 53. The Statement of Facts on Appeal

(e) Unnecessary Portions. In civil cases if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal. ....

Rule 54. Time to Fie Record

(a) In Civil Case - Ordinary Timetable. ... Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court ....

Rule 74. Requisites of Briefs

(f) Argument. ... Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

(3)

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1699

In The

Supreme Court of the United States

October Term, 1987

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN

and

HILLCREST BAPTIST HOSPITAL,

Appellees.

On Appeal from the Supreme Court of the State of Texas

MOTION TO DISMISS

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No. 87-1699

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN

and

HILLCREST BAPTIST HOSPITAL,

Appellees.

—o—

On Appeal from the Supreme Court of the State of Texas

—o—

MOTION TO DISMISS

—o—

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee, Dr. Marcial Lewin, respectfully files this Motion to Dismiss the Appeal of Gary Elliott, who appears individually and as a next friend for Shauna Marie Elliott. This motion is brought in accordance with Rule 16 of the

United States Supreme Court Rules 28 U.S.C. § 16 (1984). The grounds for this Motion to Dismiss are the following:

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE JUDGMENTS OF THE STATE COURTS OF TEXAS REST ON AN ADEQUATE NON-FEDERAL BASIS.

III. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTIONS ASSERTED BY APPELLANT WERE NOT EXPRESSLY PASSED UPON BY THE STATE COURTS OF TEXAS.

IV. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT FEDERAL QUESTIONS WHICH WERE PROPERLY RAISED IN THE STATE COURTS OF TEXAS.

———o———

STATEMENT OF FACTS AND HISTORY OF THE CASE

This case was filed in a Texas state district court as a medical malpractice case. Approximately one year after serving written discovery upon the Plaintiff, Gary Elliott, (hereinafter "Elliott" or "Appellant") and having received neither a response to the discovery request nor a motion to extend the time for answering, Dr. Marcial Lewin (hereinafter "Dr. Lewin" or "Appellee"), one

of the two defendants, filed a Motion for Sanctions under Rule 215 of the Texas Rules of Civil Procedure. Rule 215 is the Texas discovery sanction rule. After a hearing on Dr. Lewin's motion and a similar motion filed by the other defendant, Hillcrest Baptist Medical Center ("The Hospital"), the trial clerk dismissed the cause with prejudice based upon the history of discovery abuse in the case. Elliott's motion for a new trial was refused after a hearing on the matter. On appeal to the Court of Appeals for the Tenth Supreme Judicial District of Texas, the Court, following oral argument, affirmed the judgment of the trial judge because of the lack of an adequate appellate record for review. Elliott petitioned the Supreme Court of Texas for a Writ of Error and the writ was refused with a notation of "no reversible error". The subsequent Motion for Rehearing was overruled. Appellant now brings this appeal to the United States Supreme Court, alleging that a federal issue concerning the constitutionality of Rule 215 has been called in question and asserting that his due process and equal protection rights have been violated.

———o———

RESTATEMENT AND ARGUMENT OF APPELLEE'S FIRST GROUND FOR HIS MOTION TO DISMISS

First Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION.

Appellant alleges that this Court has jurisdiction to hear this case pursuant to 28 U.S.C. Section 1257(2). This

section requires two jurisdictional predicates: 1) the appeal must call in question the validity of a state statute on the ground that the statute is repugnant to the United States Constitution or other treaties or laws of the United States; and 2) the state court from which the appeal is taken, must have directly ruled in favor of the statute's validity. Elliott can not approximate these requisites in this case. While the jurisdictional statement filed by the appellant purports to frame this case as a challenge both to the constitutionality of the Texas discovery sanction rule, Rule 215 of the Texas Rules of Civil Procedure, as well as to the application of Rule 215 in this case, these questions were not timely raised in the state courts of Texas, nor were they passed upon by the appellate courts in their decisions. In fact, the third issue raised—that the application in this case of Texas appellate procedural law was in violation of appellant's due process and equal protection rights—is raised for the very first time in the jurisdictional statement to this Court.

The issue of whether or not a federal question is properly raised in the trial court of a state is a question of state law. *North Carolina R. Co. v. Zachary, N.C.*, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591 (1914). If state law is not followed, the Supreme Court is without power to decide whether constitutional rights have been violated. *Hulbert v. City of Chicago*, 202 U.S. 275, 26 S.Ct. 617, 50 L.Ed 1026 (1906). The very failure to present a federal question in conformity with the requisites of state procedure will constitute an adequate ground for the decision that will bar review from this Court, so long as the state has a legitimate interest in enforcing its procedural rules. *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978);

See also, Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953). The rule in Texas requiring proper presentation of a constitutional question to the trial court before the matter may be raised on appeal is rationally based upon the concept of fairness and comity between the court system. In this instance, the trial court was not advised in Elliott's Motion for New Trial of the attack upon the relevant Rule of Civil Procedure under which the sanction was issued; the constitutionality question regarding the statute itself was raised for the first time in the Court of Appeals. Both the Hospital and Dr. Lewin attacked the timeliness of the raising of these issues. The issue of the constitutionality of the application of sanctions in this case was not properly preserved for appeal in accordance with Texas law; additionally, as mentioned above, the issue regarding the application of Texas law regarding the need for an adequate appellate record is raised now for the first time.

In *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), this court enunciated the rationale for requiring an appellant to follow proper appellate procedure in order for this Court to have jurisdiction to review the case: 1) principles of comity require that state courts have the opportunity to perform their duty of responding to attacks upon their own statutes; 2) there must be an opportunity to develop the appellate record necessary for adjudicating the constitutionality issue; 3) state courts must be afforded the opportunity to construe their own state statutes so as to avoid constitutional challenges, allowing for decision based on independent and adequate state grounds and pretermitting the federal issue; and 4) the state courts are allowed the opportunity to correctly

address the constitutional issues and dispose of the need for consideration by this Court. *Webb* at 451 U.S. 493,500-01, 68 L.Ed.2d 392,398-99. In the present situation, not only were the federal questions untimely and improperly raised on appeal, but there also is no ruling by the appellate courts on any of the constitutionality issues. Typically, if the highest state court fails to pass upon the federal question, this Court indulges in the presumption that the omission was due to the want of proper presentation in the state court. *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

In the opinion issued by the Texas Court of Appeals it is abundantly clear that the decision of the court was predicated upon a state procedural basis—i.e., the appellant's failure to bring forward an adequate appellate record—and not upon a decision construing Rule 215 or its application by the trial court. There is no basis for jurisdiction in this case because the appellate rulings rested on a non-federal, state law basis, and there was no decision favoring the validity of Rule 215 under a properly raised federal question.

The federal questions were not properly raised in the state courts of Texas, the state courts did not rule upon the federal questions now asserted, and the state courts' decisions rest upon an adequate state ground; therefore, the appellant's jurisdictional allegations under 28 U.S.C. Section 1257 are unfounded and this Court is without jurisdiction to hear this appeal.

———o———

RESTATEMENT AND ARGUMENT OF APPELLEE'S SECOND GROUND FOR HIS MOTION TO DISMISS

Second Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE JUDGMENTS OF THE STATE COURT OF TEXAS REST ON AN ADEQUATE NON-FEDERAL BASIS.

The judgment of the Texas Court of Appeals was stated as follows:

> The court sanctioned the plaintiffs in this medical malpractice case by dismissing their suit with prejudice for an abuse of discovery. The question is whether the court abused its discretion in doing so. The judgment is affirmed because, without a statement of facts or findings of fact and conclusion of law, the court is conclusively presumed to have correctly exercised its discretion.

The standard for appellate review in this case was an "abuse of discretion" standard and Texas law concludes that without a proper appellate record, the courts must presume that the evidence supported the judgment. *The Englander Co. v. Kennedy,* 428 S.W.2d 806 (Tex. 1968). This presumption is necessary because, in the absence of a statement of facts containing all of the evidentiary support, appellate courts are unable to review all of the factors that the trial judge had before him when the decision was rendered. In such circumstances, all fact findings necessary to support the judgment of the court are implied on appeal. *Burnett v. Motyka,* 610 S.W.2d 735, 736 (Tex. 1980).

The Supreme Court does not review decisions that are based on adequate, nonfederal grounds. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). This Court reviews state court decisions only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state courts. *New York, ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed 184 (1928). An inquiry into the propriety of the state court's decision will not be made unless it appears clearly that the state has improperly evaded the constitutional issue. *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944). In other words, the state court's ruling will be subject to scrutiny only if the record reveals that the reliance upon state law is a ruse and/or obvious subterfuge to evade consideration of the constitutional issue. *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed 2092 (1945). Additionally, there must be fair and substantial support for the non-federal ground of the decision, *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958).

In the present case, clearly the basis for the Court of Appeals decision is an adequate, substantial, non-federal ground. Furthermore, relying upon that same basis of decision (that of the lack of a sufficient appellate record), the Court of Appeals noted that the constitutional issue *could not* be reviewed, and that the court must presume that the application of the sanctions was done in a constitutionally permissive way.

The adequate state law basis for the decision in this case was the sound principle of law that a re-

viewing court necessarily must have before it a record from which to examine the lower court's actions. Through the failure of the appellant himself the Texas appellate courts were denied a record of the evidentiary considerations that were available to the trial judge. Since there was no record on which to review the discretionary acts of the lower court on any basis, the Court of Appeals affirmed the judgment. Likewise, the Texas Supreme Court refused the petition for Writ of Error. Clearly, the judgment of the state court rested upon an adequate and independent state law basis, and this Appeal should be dismissed.

RESTATEMENT AND ARGUMENT OF APPELLEE'S THIRD GROUND FOR THE MOTION TO DISMISS

Third Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTIONS ASSERTED BY APPELLANT WERE NOT EXPRESSLY PASSED UPON BY THE STATE COURTS OF TEXAS.

The appeal of this case should be dismissed for the additional reason that the federal questions asserted by the appellant were not expressly passed upon by the state courts of Texas. In the written unpublished opinion, the Court of Appeals stated the following regarding the contention that the trial court acted unconstitutionally when it imposed sanctions:

> Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants.

The statements of the appellate court on this issue do not constitute an express finding either that Rule 215 of the Texas Rules of Civil Procedure is constitutional or that its application in this instance passed constitutional muster. Rather, the court recognized that it *could not* review the question because of a lack of proper appellate record. It is a fundamental prerequisite that the constitutionality question must be passed upon in the state courts; otherwise, the appeal is invalid. *Anonymous v. Baker,* 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234 (1959). Because the Texas courts did not pass upon the constitutionality of Rule 215, this appeal should be dismissed.

RESTATEMENT AND ARGUMENT OF APPELLEE'S FOURTH GROUND FOR HIS MOTION TO DISMISS

Fourth Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A FEDERAL QUESTION WHICH WAS PROPERLY RAISED IN THE STATE COURTS OF TEXAS.

In his Jurisdictional Statement filed with this Court, Elliott alleges three "constitutional questions" in this case. First is the question of whether Rule 215, as written, is contrary to the Fifth and Fourteenth Amendments to the United States Constitution. The second question is whether Rule 215, as applied in this case, violated Appellants constitutional rights and amounted to a denial of due process and equal protection under the law. Lastly, Elliott raised the inquiry of whether his due process and equal protection rights were violated because of the Court of Appeals' judgment that a review of the merits of the

case was impossible due to Elliott's own failure to provide the court with an adequate and complete appellate record.

Of the three constitutional issues Elliott seeks to bring for this Court's review, none of them were properly preserved for consideration for the Texas state courts. The issue of the application of Rule 215 by the trial court was raised briefly in the Motion for New Trial. The point of error regarding this issue was disposed of by the Court of Appeals on the basis that review was impossible because of the lack of appellate record. Furthermore, this particular point was not preserved for further review by an assigned point of error in the Motion for Rehearing in the Court of Appeals as required by Rule 100(a) of the Texas Rules of Appellate Procedure. As a result, the question of the constitutionality of the application of Rule 215 in this instance was not properly raised in the state courts since it was not preserved for rehearing to the Court of Appeals, nor was it preserved in the Petition for Writ of Error to the Supreme Court of Texas.

The question of the constitutionality of Rule 215 itself was raised for the first time in the appeal to the Court of Appeals. The trial court was never allowed the opportunity to rule on the issue. Moreover, in addition to being improperly raised, the question was not preserved for further appellate review in the Motion for Rehearing or the Petition for Writ of Error. The point of error was never properly raised in the state courts nor was it ruled upon at any point in the appeal.

Lastly, Elliott now raises with the Court, for the first time in the course of this litigation, the issue of the alleged

violation of his due process and equal protection rights by virtue of the appellate court's refusal to review the merits of the dismissal because of the failure of the appellant to provide a proper record. This point was not raised at all in the Motion for Rehearing in the Court of Appeals nor was it discussed in the petition for Writ of Error to the Supreme Court of Texas. A party may not raise a federal question for the first time in the appeal to this Court, *Moore v. Illinois,* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

A federal question must be raised at the proper point in the appellate process, and specifically must be presented before the state courts for consideration. *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Additionally, the federal question must be presented in such a way that it was necessarily ruled upon by the state courts. *Bailey v. Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945). Because Elliott failed to properly raise the constitutional issues of which he now complains, this appeal should be dismissed.

———o———

CONCLUSION AND PRAYER

This appeal brought by Gary Elliott does not meet the jurisdictional requirements under 28 U.S.C. Section 1257(2), and for that reason alone, this appeal should be dismissed. Additionally, the federal questions that Elliott raises in his jurisdictional statement were not properly raised in the Texas state courts nor were they expressly passed upon in the judgments by those courts. Finally,

the judgment of the Texas Court of Appeals, review of which was refused by the Texas Supreme Court, rests on an adequate, substantial, non-federal basis. For all of the foregoing reasons, the appeal brought by Gary Elliott, individually and as next friend of Shauna Marie Elliott, should be dismissed.

WHEREFORE, Appellee Dr. Marcial Lewin respectfully requests that this Court, upon consideration of the jurisdictional statements and the motions filed in answer thereto, enter an order summarily dismissing this appeal on its merits.

Respectfully submitted,

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No. 87-1699

In The
Supreme Court of the United States
October Term, 1987

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

v.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM, OF HILLCREST BAPTIST HOSPITAL

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No. 87-1699

In The
Supreme Court of the United States
October Term, 1987

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

v.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM, OF HILLCREST BAPTIST HOSPITAL

Hillcrest Baptist Hospital, one of the appellees herein, respectfully submits this Motion to Dismiss, or in the Alternative to Affirm, the above styled and numbered appeal, and as grounds shows:

POINT ONE

This appeal should be dismissed because it does not present a substantial federal question.

POINT TWO

This appeal should be dismissed because the alleged federal question sought to be reviewed was not timely or properly raised in the state courts.

POINT THREE

This appeal should be dismissed because the alleged federal question to be reviewed was not expressly passed on by the Texas state courts.

POINT FOUR

This appeal should be dismissed because the judgment appealed from rests on an adequate non-federal basis.

POINT FIVE

The Court should affirm the judgment sought to be reviewed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

———o———

FACT STATEMENT

In order to give the Court some factual background with which to review this case, appellee Hillcrest submits the following fact statement.

Suit was filed on November 4, 1983, in the 129th District Court of Harris County, Texas. (Tr. 10) It was transferred to McLennan County on change of venue, (Tr. 15) and received by the district clerk on or about May 2, 1984. As of February 1985, over nine months later,

plaintiff still had not paid the filing fee in order for the case to be docketed in McLennan County.

Hillcrest moved to dismiss without prejudice based on this failure to pay the filing fee. (Tr. 26) The trial court overruled the motion to dismiss, giving the plaintiff the opportunity to pay the filing fee, which was thereafter paid.

On May 28, 1985, defendant Hillcrest served on counsel for plaintiff a set of written interrogatories. (Tr. 40, 53) Under Rule 168, *Tex. R. Civ. P.*, answers were due on June 30, 1985. Nearly a month *after* the due date, on July 22, 1985, Penny Wymyczak, a legal assistant in the office of plaintiff's counsel, Benton Musslewhite, telephoned counsel for defendant Hillcrest and requested a second copy of the interrogatories. A second copy was mailed on July 24, 1985. (Tr. 55)

Over two months later, on September 27, neither answers to the interrogatories nor a motion for extension of time having been filed, Hillcrest filed a motion under Rule 215, *Tex. R. Civ. P.*, for sanctions against plaintiff for failing to answer interrogatories. (Tr. 49) A hearing on this motion was set for November 1, 1985.

On October 3, 1985, Ms. Wymyczak again telephoned the office of counsel for Hillcrest and requested a third copy of the interrogatories first mailed on May 28. On October 4, 1985, counsel for Hillcrest forwarded a third copy.

On October 22, counsel for Hillcrest received a telephone call from plaintiff's counsel's office requesting a

second copy of the Rule 215 motion which had been mailed on September 27.

On October 29, only three days prior to the hearing on defendant's motion, a representative from the office of plaintiff's counsel telephoned counsel for Hillcrest, advised that the answers to interrogatories were being sent by courier service, and requested that the November 1 hearing be cancelled due to a death in the family of plaintiff's counsel. The interrogatory responses subsequently arrived with a cover letter dated October 30.

Counsel for Hillcrest reviewed the answers and concluded that the answers to Interrogatories Nos. 9, 10, and 22 were incomplete and insufficient. In this medical malpractice suit these interrogatories were critical to Hillcrest's ability to prepare a defense. Interrogatory No. 9 requested the names of all doctors who had treated plaintiff's wife during the ten years prior to her death. Plaintiff responded that he was in the process of obtaining this information and would provide it. Question No. 10 asked for *the name* of every hospital in which plaintiff's wife was a patient. Plaintiff answered "for childbirth." Question No. 22 asked for specific facts which formed the basis of allegations of negligence against Hillcrest. Plaintiff responded, "Because of the negligent acts or omissions of the staff, our plaintiff's untimely death was caused." (Tr. 59, 60, 63)

On November 1, counsel for Hillcrest wrote to plaintiff's attorney agreeing to cancel the November 1 hearing but rescheduling it for November 22 due to the insufficient answers to Question Nos. 9, 10, and 22.

On November 21, 1985, *one day* prior to the scheduled hearing, Jane Hayes, in Mr. Musslewhite's office, telephoned counsel for Hillcrest and asked that the next day's hearing be cancelled because plaintiff's attorney was in Greece. Counsel for Hillcrest again accommodated counsel for plaintiff.

Plaintiff in his answers to interrogatories served on October 30 had stated that he would supplement his answer to Interrogatory No. 9 after he secured additional information. Seven months later, on May 23, 1986, having received no supplemental answers, counsel for Hillcrest wrote a letter to plaintiff's attorney, reviewing the previous efforts to schedule a hearing and advising that the hearing for sanctions was reset for June 13, 1986.

The hearing was held on June 13. Mr. Musslewhite did not attend. Instead he sent two attorneys, Susan Ashley and Jeff McElroy, who stated to the court that they were authorized to represent plaintiff. (Tr. 84) On this day a supplemental answer to Interrogatory No. 22, signed by counsel for plaintiff, was filed. (Tr. 81) At the hearing the attorney for Hillcrest, Roy L. Barrett, produced an affidavit signed by him outlining the procedural history of this case in support of the Rule 215 motion. Mr. Barrett stated that he would take the stand and testify to the contents of the affidavit if the lawyers representing plaintiff requested. Otherwise, with the court's permission, he would offer the affidavit into evidence as his direct testimony and make himself available for cross-examination. Ms. Ashley and Mr. McElroy both expressed no objection to this procedure and the affidavit was marked as an exhibit and introduced into evidence. The lawyers repre-

senting plaintiff declined the opportunity to cross-examine Mr. Barrett, and the court then excused him as a witness.

Following the hearing the trial court, on June 16, 1986, rendered a judgment of dismissal with prejudice. (Tr. 84) This judgment recites, in part:

> The Court, *having heard the evidence* and considered the pleadings, affidavit, motions for sanctions filed by both defendants, and having heard argument of counsel, finds that plaintiffs had due and proper notice from both defendants of said hearing, and further finds that plaintiffs have abused the discovery process, as set forth in the *Texas Rules of Civil Procedure*, by resisting proper discovery directed to plaintiffs herein as fully established by the record before the Court at said hearing, and the Court further finds that it should impose the sanction authorized by Rule 215 and strike all pleadings of plaintiffs herein, dismiss all plaintiffs' claims and causes of action herein with prejudice and render judgment that plaintiffs take nothing from defendants herein. (Emphasis added.)

On July 15, 1986, plaintiff filed a "Motion for New Trial with Respect to the Court's Order Dismissing Plaintiffs' Case Pursuant to Rule 215." (Tr. 86) On August 27, 1986, a lengthy evidentiary hearing was held on this motion. The trial court overruled plaintiff's motion in an order which is not in the record but which recited, in part:

> On the 27th day of August, 1986, after due and proper notice to all parties, came on for hearing plaintiffs' Motion for New Trial herein, and came plaintiffs, Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, by their counsel of record, and came both defendants, Dr. Marcial Lewin and Hillcrest Baptist Medical Center, by their re-

> spective counsel of record, and the Court, after considering said Motion for New Trial, *hearing evidence and argument of counsel*, and considering the pleadings and other documents on file herein, was of the opinion that said Motion for New Trial should be in all things overruled. (Emphasis added.)

Appellant appealed from these two orders to the Tenth Court of Appeals at Waco, Texas. However, he failed to include in the appellate record a statement of facts of the evidence heard by the trial court at either of the two hearings.

The court of appeals affirmed the judgment on the ground that it did not have a complete record. Plaintiff made application to the Texas Supreme Court for writ of error seeking reversal of the lower courts' judgment. The supreme court refused to find any reversible error and refused the application for writ of error.

POINT ONE, RESTATED

This appeal should be dismissed because it does not present a substantial federal question.

POINT TWO, RESTATED

This appeal should be dismissed because the alleged federal question sought to be reviewed was not timely or properly raised in the state courts.

POINT THREE, RESTATED

This appeal should be dismissed because the alleged federal question to be reviewed was not expressly passed on by the Texas state courts.

POINT FOUR, RESTATED

This appeal should be dismissed because the judgment appealed from rests on an adequate non-federal basis.

ARGUMENT AND AUTHORITIES UNDER POINTS ONE, TWO, THREE AND FOUR

Jurisdiction of this appeal is based on 28 U.S.C. § 1257, which states in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellants Elliott, et al, appeal from the Supreme Court of the State of Texas, "seek[ing] review of a decision of the Supreme Court of Texas affirming a dismissal of appellants' medical malpractice case with prejudice." (Jurisdictional Statement, pp. 1-2)

In order for the Court to have jurisdiction of this case it must affirmatively appear that (1) a substantial federal question was (2) properly presented to the highest state court and was (3) passed upon by that court and that (4) the decision of the federal question was necessary to the determination of the cause. *Durley v. Mayo*, 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183 (1955); *Webb v. Webb*, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 68 L.Ed.2d 392, 397 (1981). The absence of each of these elements will be discussed below.

1. *Appeal Does Not Present Substantial Federal Question*

In order for this appeal to be within the jurisdiction of this Court it must present a "substantial federal question." *Great Northern Railway Company v. Alexander,* 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1917); *New Orleans Waterworks Company v. State of Louisiana,* 185 U.S. 336, 346, 22 S.Ct. 691, 46 L.Ed. 936, 942 (1901). No such question is presented by this appeal.

As shown by the fact statement above, the only question presented by this appeal is whether the failure of the appellant to provide a complete record of all proceedings in the trial court required the appellate courts to presume, in the absence of the evidence which was before the trial court, that the trial court properly exercised its discretion and that its actions were supported by the evidence before the court.

Clearly this is purely a question of state law. It is also clear that this principle of state law is well-established and consistently applied. See for example *Fenton v. Wade,* 303 S.W.2d 816, 818 (Tex. Civ. App.—Ft. Worth 1957, writ ref'd n.r.e.); *Arlington Bank & Trust v. Nowell Motors, Inc.,* 511 S.W.2d 415, 516 (Tex. Civ. App.—Ft. Worth 1974, n.w.h.); *Men's Warehouse v. Helms,* 682 S.W.2d 429, 430 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e., cert. den., 106 S.Ct 38); *McFadden v. Farmers and Merchants Bank of Long Beach,* 689 S.W.2d 330, 332 (Tex. App.—Ft. Worth 1985, n.w.h.); *Olivares v. Cauthorn,* 717 S.W.2d 431, 434 (Tex. App.—San Antonio 1986, writ dism'd.). There is nothing arbitrary about its application to this case.

When a case presents only a question of state law, and not a substantial federal question, this Court does not have jurisdiction under 28 U.S.C. § 1257. *New Orleans Waterworks Company v. Louisiana, supra,* 185 U.S. at 346. Therefore, since this appeal does not present a substantial federal question, it should be dismissed.

2. *Federal Question Not Timely or Properly Raised*

Rule 15.1(g) of the rules of this Court requires an appellant to specify in his jurisdictional statement the stage of the proceedings at which the questions sought to be reviewed were first raised, the method or manner of raising them, and the way in which they were passed upon by the state court. Appellants have failed to comply with this requirement. Appellants have failed to provide to this Court in the appendix copies of their briefs in the state courts so this Court can determine whether the alleged federal question was raised in the state courts. *Lynch v. People of the State of New York,* 293 U.S. 52, 54, 55 S.Ct. 16, 79 L.Ed. 191, 193 (1934).

In fact appellants did not raise any complaint in the trial court about the constitutionality of Rule 215 either as written or as applied. In Texas, matters not raised in the trial court will not be considered on appeal. *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1982).

Unconstitutionality must be raised in the trial court in order to be considered on appeal. *United Postage Corporation v. Kammeyer,* 581 S.W.2d 716, 722 (Tex. Civ. App.—Dallas 1979, n.w.h.); *Babcock v. State,* 668 S.W.2d 857, 861 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Red-*

dix v. Eaton Corporation, 662 S.W.2d 720, 723 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

A point raised for the first time on appeal is not properly presented where the state's procedural rules require issues to be first raised in the trial court in order to be considered on appeal. *Louisville & Nashville Railroad Company v. Woodford*, 234 U.S. 46, 51, 34 S.Ct. 739, 58 L.Ed. 1202, 1208 (1913). Consequently any effort to raise the issue of unconstitutionality at any stage subsequent to the trial court would not serve to invoke this Court's jurisdiction.

Even though they had not presented the issue of unconstitutionality in the trial court, appellants included in their brief in the state court of appeals a point of error complaining of the alleged violation of their constitutional rights in the manner in which Rule 215 was applied to them. They did *not* complain that Rule 215 was unconstitutional as written.

Although the issue of unconstitutionality had not been raised in any manner in the trial court, and thereby preserved for appeal, the court of appeals did acknowledge that point in its opinion. The court resolved this issue on a nonfederal procedural ground, as follows, holding essentially that it could not reach the point due to an incomplete record.

> Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants. See Englander Co., Inc., 428 S.W.2d at 806-07. Point two is overruled.

Appellants did not include in their Motion for Rehearing in the court of appeals a point complaining of the unconstitutionality of Rule 215 either as written or as applied. The Texas Supreme Court has no jurisdiction to consider points included in an application for writ of error unless those points have been preserved in a motion for rehearing. *Wallace v. Scrogum*, 372 S.W.2d 941 (Tex. 1963); *East Texas Motor Freight Lines v. Loftis*, 148 Tex. 242, 223 S.W.2d 613, 616 (1949).

In their application for writ of error filed in the Texas Supreme Court appellants included a point complaining that the way Rule 215 was applied in this case violated their constitutional rights. Because no such point had been included in appellants' Motion for Rehearing in the court of appeals, the Supreme Court of Texas had no jurisdiction to consider this point.

This Court has held that if the state court fails to pass expressly upon the federal question, it will be presumed that the federal question was not properly presented in the state court, unless the complaining party can affirmatively show to the contrary. *Street v. State of New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed. 2d 572, 579 (1969). Since the Texas Supreme Court did not expressly pass on the alleged federal question it must be presumed that the question was not properly presented to that court by having been preserved in a motion for rehearing in the lower court.

Appellants have raised a new point in this Court, concerning the alleged unconstitutionality of Rule 215 *as written*. This point has not been presented in the state

court at any level. The question of the unconstitutionality of Rule 215 as written not having been properly presented to or ruled on by the state court, it is not properly before this Court and this Court has no jurisdiction to consider it. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671, 96 S.Ct. 2358, 49 L.Ed.2d 132, 136 n. 3 (1976); *Cardinale v. State of Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969).

In summary, appellants did not raise the question of unconstitutionality in the trial court. They complained of the unconstitutionality of the *application* of Rule 215 to the facts in this case in the state court of appeals. Although this point had not been preserved, the court of appeals nevertheless disposed of this point on the procedural basis of the absence of a complete record. Appellants did not include unconstitutionality as a point in their Motion for Rehearing in the court of appeals. Appellants complained of the application of Rule 215 in the Texas Supreme Court but that court had no jurisdiction to consider the point. Appellants have raised a point complaining of the unconstitutionality of Rule 215 *as written* for the first time in this Court.

Clearly, appellants' complaints concerning the alleged unconstitutionality of Rule 215 as written and as applied in this case were not timely or properly raised in the state courts and this Court therefore has no jurisdiction under 28 U.S.C. § 1257 to consider these points, and this appeal should be dismissed.

3. *Federal Question Not Expressly Passed On By Texas State Court*

In order for a state court case to be reviewed in the United State Supreme Court, it must appear from the record that a federal question was decided by the highest state court. *Cardinale v. Louisiana, supra,* 394 U.S. at 438; *State of California v. Holladay,* 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1895).

In this case the Texas Supreme Court did not decide the issue of unconstitutionality of Rule 215 as applied because, as shown above, the court had no jurisdiction to consider the point, there being no such point contained in appellants' Motion for Rehearing in the court of appeals. *Wallace v. Scrogum,* 372 S.W.2d at 943; *East Texas Motor Freight Lines v. Loftis, supra,* 223 S.W.2d at 616.

"Where the highest court in the state delivers no opinion and it appears that the judgment *might* have rested upon nonfederal grounds, this Court will not take jurisdiction to review the judgment." *Stembridge v. State of Georgia,* 343 U.S. 541, 547, 72 S.Ct. 834, 96 L.Ed. 1130, 1134 (1951); *Durley v. Mayo, supra,* 351 U.S. at 281.

In addition, the court of appeals was unable to reach, and did not expressly rule on, the question of unconstitutionality. The court held that due to the absence of a complete record it had to presume that the trial court acted within its discretion. In any event the court of appeals would have been unable to address this point on the merits, and would have acted improperly had it done so, because the issue was not raised in the trial court, and therefore not preserved for appeal. *United Postage Cor-*

poration v. Kammeyer, supra, 581 S.W.2d at 722; *Babcock v. State, supra,* 668 S.W.2d at 861.

Appellants' newly raised point concerning the unconstitutionality of Rule 215 *as written* has not been passed upon by any Texas state court because it was not presented to any Texas state court. Since this issue was neither raised in nor ruled on by any state court, it is not properly before this Court and this Court has no jurisdiction under 28 U.S.C. § 1257 to consider it. *Cardinale v. Louisiana, supra,* 394 U.S. at 438.

4. *Judgment Rests on Adequate Nonfederal Basis*

The Supreme Court will not entertain jurisdiction of an appeal where the state court judgment is based on a nonfederal ground. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 129, 65 S.Ct. 1475, 89 L.Ed. 2092, 2100 (1944).

As discussed above, appellants' complaint of the unconstitutionality of Rule 215 *as written* has been raised for the first time in this Court. Therefore, it was not passed on by a state court, is not properly before this Court, and will not be discussed in this section of appellees' motion.

The Texas Supreme Court refused to find any error in the court of appeals' judgment. This refusal to find error could have been based on at least two state procedural grounds.

First, appellants did not include a point on unconstitutionality in their Motion for Rehearing in the court of appeals. This step was a prerequisite to the Texas Supreme Court having the power and authority to consider

the point. *Wallace v. Scrogum, supra,* 372 S.W.2d at 941; *East Texas Motor Freight Lines v. Loftis, supra,* 223 S.W.2d at 616.

Secondly, appellants failed to include in the record statements of fact from either of the two evidentiary hearings held in the trial court. The lack of a complete record of the proceedings below is an adequate nonfederal ground precluding review by this Court. *Hedgebeth v. State of North Carolina,* 334 U.S. 806, 807, 68 S.Ct. 1185, 92 L.Ed. 1739, 1740 (1948).

Either one of these two procedural grounds could have been the basis for the failure of the Texas Supreme Court to find any reversible error in the court of appeals' treatment of appellants' unconstitutionality claim. Since the judgment of the highest state court can be based on one of these nonfederal grounds this Court should decline to entertain this point.

The court of appeals' judgment was very clearly and expressly based on nonfederal grounds. The court held that without a statement of facts or findings of fact and conclusions of law, it must presume that the trial court's actions were proper.

It is a well-recognized and consistently applied principle in Texas that when an appealing party fails to bring to the appellate court a complete record, the court must presume that the omitted portions of the record support the judgment. *The Englander Company, Inc. v. Kennedy,* 428 S.W.2d 806, 807 (Tex. 1968). All presumptions as to the evidence must be in support of the judgment when the appellant chooses not to file a statement of facts. *Robinson*

Electric Supply Company v. Cadillac Cable Corporation, 706 S.W.2d 130, 133 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

The failure of a party to provide the state court with a full record is an adequate nonfederal ground for decision. *Hedgebeth v. North Carolina, supra,* 334 U.S. at 807. Consequently, this Court should decline to consider this appeal.

POINT FIVE, RESTATED

The Court should affirm the judgment sought to be reviewed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

———o———

ARGUMENT AND AUTHORITIES UNDER POINT FIVE

The Court should affirm the judgment sought to be reviewed because the questions presented by this appeal are unsubstantial and so wanting in substance as not to merit the attention of this Court.

This case involves the imposition of discovery sanctions and, specifically, dismissal with prejudice of appellants' case as a result of a lengthy and unexplained failure to comply fully with reasonable discovery requests. Appellants complain that the trial court's action in dismissing the case under Rule 215 violated their constitutional rights to due process.

The two orders of the trial court about which appellants complain, the judgment and the order overruling

appellants' Motion for New Trial, both recite that the trial court heard and considered evidence. Appellants failed to provide to the state appellate courts any record of the evidence heard at either of the two hearings. The court of appeals' opinion was based squarely on the failure of appellants to bring up a complete record of all the proceedings below. The Texas Supreme Court found no error in this ruling.

Appellants now ask this Court to hold that the manner of application of Rule 215 in this case violated their constitutional rights to due process when appellants have failed through the absence of a complete record to show exactly what process they were afforded.

The court of appeals found expressly that appellants were given proper notice of the sanction hearing and participated therein through counsel. Appellants have not challenged this finding. Appellants were afforded the opportunity to cross-examine the witness who testified in support of the requested sanction, but they failed to do so.

Having received proper notice and the opportunity to participate, appellants were afforded due process unless the trial court's order was not rationally based on the evidence before the court at the two evidentiary hearings. As those proceedings have not been included in the record on appeal, the state appellate courts were required under Texas law to presume, and did presume, that the trial court did not commit an abuse of discretion.

The application of this principle to this case does not present a substantial federal question requiring additional

argument. Consequently the judgment appealed from should be affirmed.

CONCLUSION

For all of the reasons set out above this Court is respectfully requested to dismiss this appeal, or alternatively to affirm the judgment appealed from.

Respectfully submitted

Roy L. Barrett
of
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Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1699

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,
Appellants,

versus

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,
Appellees

*

On Appeal From The Supreme Court
of the State of Texas

*

APPELLANTS' RESPONSE TO MOTION OF HILLCREST BAPTIST HOSPITAL FOR DAMAGES AND DOUBLE COSTS

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NO. 87-1699

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TO THE HONORABLE UNITED STATES SUPREME COURT:

Comes Now Appellants and in response to motion of Hillcrest Baptist Hospital for damages and double costs, would show:

I.

Without any question, this appeal is not

frivolous because: (a) as reflected in Appellants' Jurisdictional Statement and Appellants' Response to Appellees' Motion to Dismiss or Affirm, both being referred to and incorporated herein by reference, this case involves substantial constitutional and due process questions of whether Rule 215 of the Texas Rules of Civil Procedure, as applied in this case, and as written is unconstitutional and whether the Texas appellate courts, in refusing to consider (to the extent that they did so) Appellants' appeal on its merits, violated Appellants' due process and equal protection rights under the United States Constitution; and a substantial question is involved and determining whether the alleged state ground for affirming the unconstitutional dismissal of the Appellants' case by the trial court - namely the failure to have a "Statement of Facts" filed when in fact none was needed for a disposition of Appellants' appeal on the merits - is an independent and adequate state ground. (b)

Appellees' assertion that Appellants' did not timely and properly raise the unconstitutionality of Rule 215 as applied in the state courts is in itself a frivolous assertion and constitutes a gross mistatement of the record that existed before the state courts. (See Supplemental Appendicies and Appellants' Response to Appellees' Motion to Dismiss or Affirm). (c) There is a substantial and extremely important question in this case of whether or not the disposition of this case in the state courts rested "squarely and expressly on an adequate nonfederal basis" and, as can be seen from Appellants' response to Appellees' Motion to Dismiss or Affirm, the alleged nonfederal ground used in this case by the state appellate courts - namely the failure to have a Statement of Facts when in fact none was needed and the appellate courts had before them the official Transcript of the trial court proceedings which was sufficient in itself to enable the appellate courts to

determine that Rule 215 had been unconstitutionally applied in this case - does not pass muster in the face of a number of varied tests that the Supreme Court has employed to determine whether an alleged nonfederal ground is in fact adequate. (See Appellants' Response to Appellees' Motions to Dismiss or Affirm). Therefore, the Appellees' request for damages and double costs should be in all things denied.

II.

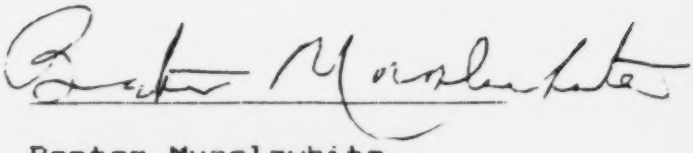
Because of Appellees' gross mistatements of the record in their Motions to Dismiss or Affirm, Appellants' are tempted to request damages of double costs from Appellees but consistent with this counsel's philosophy concerning sanctions and similar proceedings, particularly how such efforts are clogging our court systems and deterring innovative practice of the law, we will not make such a motion.

WHEREFORE, Appellants' pray the Court to deny the Appellees' motion for damages and

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double costs.

Respectfully submitted,

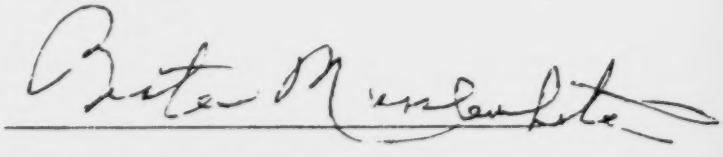


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been this day placed in the United States Mail, postage prepaid and appropriately addressed to Appellees' attorney of record.

Dated: May 23, 1988.



Benton Musslewhite

Supreme Court, U.S.
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MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

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On Appeal from the Supreme Court of
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APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

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*For a thorough Review, see Appendices filed with Jurisdictional Statement

App. S: Plaintiffs Motion for New Trial With Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant To Rule 215 (filed in the Texas trial court)

App. T: Excerpts from Brief of Appellants (filed in the Texas court of appeals)

App. U: Excerpts from Motion for Rehearing of Appellants (filed in the Texas court of appeals)

App. V: Excerpts from Amended Petition for Writ of Error (filed in the Texas supreme court)

App. W: Excerpts from Motion for Rehearing and Reconsiderati of Petition for Writ of Error (filed in the Texas supreme court)

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On Appeal from the Supreme Court of
the State of Texas

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APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Appellants respectfully hereby respond to Appellees' motions to dismiss or affirm.

I.

The federal questions sought to be reviewed were properly raised in the state courts of Texas.

It is rather surprising that Appellees would so blatantly misstate the record that

was made in the Texas courts. In essence, the Appellees assert that Appellants did not raise any complaint about Rule 215, Texas Rules of Civil Procedure ("TRCP") as written "or as applied" in the Texas trial court, court of appeals or supreme court (pp. 10, 12 of Appellee Hillcrest's motion to dismiss and pp. 4, 5 of Appellee Lewin's motion to dismiss). Such statements are simply incorrect. We are filing, concurrent with this Response, Supplemental Appendices which include excerpts from: Appellants' motion for new trial in the state district court (App. S); brief of Appellants' in the state intermediate appellate court, the court of appeals (App. T); Appellants' motion for rehearing in the court of appeals (App. U); Appellants' petition for writ of error in the Texas supreme court (App. V); and Appellants' motion for rehearing and reconsideration of petition for writ of error in the Texas supreme court (App. W).

Page 5, 6 of App. S, the motion for new trial filed by Appellants in the state

district court, contains the express statements that "[t]he impositon of the drastic sanction of dismissal in the context of this case (a Rule 215 sanctions case) constitutes a violation of the Plaintiffs' due process rights, under ... the Constitution of the United States ..." and further that, quoting from Justice Kilgarlin of the Texas supreme court, the "United States Supreme Court in *Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovery sanction orders generally" and that "the sanctions *authorized by Rule 215(2)(b) must be made with these due process concerns in mind.*"

The state district court was required, as mandated by the Texas supreme court in *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 238, 241 (Tex. 1985), to consider the arguments contained in Appellants' motion for new trial and the matters argued therein are deemed to have been "properly presented" to the state

district court in sanctions proceedings. Thus, the question of the application of Rule 215 was *indisputably* raised in the district court and necessarily rejected by it when it overruled Appellants' motion for new trial (See order overruling motion for new trial, App. D).

Next, Appellants' attack upon the constitutionality of the manner in which rule 215 was applied in this case was expressly, thoroughly and vigorously argued in the Appellants' brief before the state court of appeals, see Point of Error IV and pp. 6, 7, 9-14 of App. T. The constitutional siege continued, contrary to Appellees' assertions, in Appellants' motion for rehearing filed in the state court of appeals, see pp. 3, 4, 6 of App. U. Appellants' petiton for writ of error filed in the state supreme court is exhaustive in its discussion of the constitutional issues vis-a-vis Rule 215, see pp. 3, 6, 8 of App. V,[1] and such issue is likewise raised in Appellants' motion for rehearing filed in the Texas supreme court,

pp. 8, 9 of App. W. In sum, the question of the unconstitutionality of Rule 215, ***as applied in this case***, was clearly raised and rejected in the state district court, the state court of appeals and the state supreme court and we cannot understand why Appellees, in the face of the uncontroverted record, would say differently.

As to the question of the unconstitutionality of the actions of the Texas appellate court in refusing (to the extent that it did so refuse, see discussion *infra*) to consider Appellants' appeal on its merits, contrary to Appellees' assertions that such issue was raised for the first time in the Jurisdictional Statement in this Court, such issue was expressly raised in the Appellants' motion for rehearing in the Texas supreme

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1. For example, the heading (no. 3) on page 39 of App. V states: "Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it (the statute) is unconstitutional."

court (see App. W, pt. (d), p.8).[2]

In any event, the extent to which the constitutional issues were raised in the state courts in this case was far in excess of what this Court has required in similar circumstances. The Court, in *New York ex rel Bryant v Zimmerman*, 278 US 63 (1928), discussed the requirement that the federal issue must be "drawn into question" in the state court, in these terms:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clearintendment that this was done, the claim is to be regarded as having been adequately presented.

278 US at 67. See also *Dewey v Des Moines*, 173 U.S. 193, 199 (1899); and *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S.

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2. Such issue could not possibly have been raised until in the Texas supreme court because the action complained of did not occur in the trial court but in the intermediate appellate court.

430, 434, 435 (1940) (discussing the "pressed *or* passed upon" test).[3]

Under the parameters outlined in *New York v. Zimmerman* and *Dewey v. Des Moines*, there can be no doubt that Appellants vigorously "pressed", "presented" or "raised" in the state trial court, the intermediate appellate court and the state supreme court the issue of whether Rule 215, "as applied" in this case, was unconstitutional. Recent decisions of this Court clearly support this conclusion.[4]

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3. As we have noted, Appellee Hillcrest's clamor that the constitutional issues relative to Rule 215 were not raised in Appellants' motion for rehearing in the state court of appeals is just simply contrary to the record, see App. U, particularly when the terms of Rule 131, Tex. R. App. P., are considered ("Points will be sufficient if they direct the attention of the court to the error relied upon.").

4. See *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); *Three Affiliated Tribes v. Wold Engineering*, 106 S.Ct. 2305, 2309 (1986); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85, 86 n.9 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 113, 114 n.9 (1982); *Beck v. Alabama*, 447 US 625, 631 n.6 (1980); *Vachon v. New Hamp- shire,* 414 U.S. 438, 479 n.3 (1984); *Nat'l Bldg Assn v. Brahan*, 193 U.S. 635 (1904); *Gomez v. Franscisco Ocasio Perez*,

As to the unconstitutionality of the Texas court of appeals' action in attempting to finesse the Rule 215 issue because no "statement of facts" was filed, since such issue was raised in the Texas supreme court, see p. 8, App. W, this Court has indicated that matters first raised in the state appellate court system are deemed timely raised if the actions complained of did not occur until the case reached the appellate courts. See ***Great Northern Ry. v. Sunburst Oil & Refining Co.***, 287 U.S. 358, 366 (1932); ***Missouri v. Gehner***, 281 U.S. 358, 366 (1932); ***Brinkerhoff Faris Trust & Sv. Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917); and ***Aetna Life Insur. Co. v. Lavoie***, 106 S.Ct. 1480, 1583-84 (1986). Thus, the Appellants' complaints about the actions of the state court of appeals were timely raised and presented.

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409 U.S. 535, 537-539 (1973); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282, 290 (1921); and ***Cox Broadcasting Corp. v. Cohen***, 420 U.S. 469, 476 (1975)(constitutional issue raised in appellants' "motion for rehearing in the Georgia Supreme Court").

Lastly, the question of the constitutionality of Rule 215 "as written" could possibly come within the scope of the question of the constitutionality of Rule 215 "as applied",[5] see Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4022, p. 704, and thus be considered just as timely raised as the "as applied" issue.

II.

An appeal is appropriate even where the sole argument is that the statute in question is unconstitutional "as applied", as distinguished from being unconstitutional "as written".

We concede that our attack upon Rule 215 in the state trial, intermediate appellate and supreme courts is more clearly stated in terms of the unconstitutionality of Rule 215 "as applied" to this case (See App. S, T, U and V). But, even if this is so, the Appellees are not entitled to have this appeal dismissed because the cases are legion in which the Court has authorized appeals under 28 U.S.C. 1257 (2) even though the sole

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5. However, an argument that Rule 215 is unconstitutional as written can possibly be discerned from the petition for writ of error filed in the state supreme court. (App. V, pp. 8-11).

federal question is the unconstitutionality of the manner in which a state statute has been "applied" to the facts of that particular case. ***Dahnke-Walker***, 257 U.S. at 288-290;[6] ***Calder v. Jones***, 465 U.S. 783, 788 (1984); ***Japan Air Lines Ltd v. County of Los Angeles***, 441 U.S. 434, 440, 441 (1979); ***R. J. Reynolds v. Durham County***, 93 L.Ed.2d at 459, 460; and ***Ybarra v. Illinois***, 444 U.S. 85 (1976).

---

6. The Court stated: "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, *as to the transaction in question* the Kentucky statute was void, and therefore unenforceable because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but *applied* and enforced the statute. Of course, that was an affimation of its validity when so *applied*. * * * That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid *as applied* to one state of facts, and yet valid as *applied* to another. * * * Our conclusion on the jurisdictional question is that, as *the state court applied* and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so *applied* and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. * * *". (emphasis ours.)

III.

The federal and constitutional questions presented in the state courts were necessarily decided by the state courts and, to the extent that they were not decided because of state procedural grounds, such state grounds were not independent and adequate.

A. Federal and constitutional issues not only properly presented but also necessarily decided by the state courts.

The crucial issue in this case - whether the trial court's dismissal under Rule 215 was unconstitutional as applied to this case - after being expressly and squarely presented in Appellants' motion for new trial to the trial court, App. S, was necessarily "decided" by the trial court when it summarily denied the motion for new trial, App. D. After such constitutional issue was again squarely presented to the Texas court of appeals, App. T, such court, though obviously attempting to finesse or outright evade the constitutional issue, nevertheless made statements in its opinion that could be construed as a decision on the merits of the constitutional issue. App. C, pp. 4, 5. The

court of appeals there referred to Appellants' "second point ... that the court acted unconstitutionally when it imposed sanctions" (under Rule 215).

Thus, apparently the substantial question of whether it is constitutionally proper to use a sanction rule, such as Rule 215, as a basis for the drastic remedy of dismissal with prejudice "although no order has ever been entered to compel discovery" (which is exactly what happened in this case) ***was at least partially addressed*** by the court of appeals and necessarily rejected by its decision to affirm.

Furthermore, the federal questions of the constitutionality of the trial court's dismissal under Rule 215 and the court of appeals' at least partial refusal to consider Appellants' appeal on its merits, having been raised in the supreme court (App. U, V and W), were necessarily decided and rejected by the supreme court by virtue of its order denying writ of error, App. B, and its order denying a rehearing, App. A.

This Court has articulated the rule that where state court orders or judgments are silent or ambiguous as to the precise basis for their rulings, "[i]n the absence of positive assurance" or a "plain statement" to the contrary from such courts, the Supreme Court will assume that "the merits" of the federal or constitutional issues, having been raised, were decided. *R. J. Reynolds Tobacco Co. v. Durkam County*, 93 L.Ed.2d 448, 460 (1986); *Michigan v. Long*, 463 U.S. 1032 (1983) (articulating the "plain statement" rule); *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1441-1450 (1986); *New York v. P. J. Video, Inc.*, 106 S.Ct. 960, 963-964 (1986); *Caldwell v. Mississippi*, 106 S.Ct. 2633, 2638-2639 (1985); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 3427 n. 50 (1982); *In Re Primus*, 436 U.S. 412, 98 SCt 1893, 1905-6 (1978); and *Old Dominion Branch 496, Nat'l Assn of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974).

In this case, since there was no "plain statement" by the Texas trial court in

overruling Appellants' motion for new trial, nor by the court of appeals in its decision, nor by the supreme court in its order overruling the petition for writ of error[7] and motion for rehearing, to the effect that the state courts relied solely on state grounds in reaching their decisions, this Court can assume, particularly in view of the ambiguous statement by the court of appeals noted above, that the Texas courts addressed and rejected appellants' contentions that Rule 215, as applied in this case, was unconstitutional and that the action of the court of appeals, in refusing (to the extent that it did so refuse) to consider Appellants' appeal on its merits, was unconstitutional.

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7. This Court has consistently held that the denial of writ of error by a state supreme court constitutes a ruling upon the issues raised in the writ of error. See, e.g., *Atchison T. & S. F. Ry. Co. v. Public U. Commission*, 346 U.S. 346, 348, 349 (1953).

B. Even if the Court should conclude that the Texas court of appeals and the supreme court were basing their decision solely upon the state procedural ground that no "Statement of Facts" was filed in the court of appeals, the Court should still accept jurisdiction because such state procedural ground is "inadequate" under any one of a number of tests employed by this Court.

In our Jurisdictional Statement, pp. 7-25, 45-60, we clearly established that the procedural facts, necessary for the state appellate courts' decision on the merits of Appellants' contention that Rule 215 was unconstitutional as applied in this case, were fully contained in the "Transcript" which *was filed* in the court of appeals and, in any event, there was no disagreement about the essential procedural facts between the parties as reflected in their briefs before the state court of appeals and the supreme court. The court of appeals and supreme court knew full well that there was absolutely no need for a "Statement of Facts" (which is the name of the document that normally contains the testimony of witnesses who testify *at a trial on the merits*) in

order to pass upon the merits of Appellants' point of appeal that Rule 215 was unconstitutional as applied in this case. The utilization of the rationalization by the state appellate courts that they could not decide such issue without a "Statement of Facts" was obviously an unwarranted evasion of the constitutional issue and cannot constitute an "adequate" state ground for avoiding jurisdiction under 1257(2). ***Ancient Egyptian Arabic Order of Nobles of the Mystick Shaine v. Michigan,*** 279 U.S. 737 (1929).

As stated by Wright-Miller-Cooper-Gressman, ***Federal Practice and Procedure***, Vol. 16, Sect. 4021, p. 580, "[i]ndependent state grounds for decision might thwart federal rights as a matter of deliberate evasion, subtle and subconscious evasion, or simply poor judicial performance" if the Supreme Court were not to analyze the vehicle used by a state court to avoid a constitutional or federal issue. Thus, the Court always has jurisdiction to determine

whether a state procedure "is adequate" when it is used as a means of pretermitting the federal or constitutional question. *Fay v. Noia*, 372 U.S. 391 (1963); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Railway Express v. Levee*, 263 U.S. 19 (1923); and *International Longshoremen's Association v. Davis*, 106 S.Ct. 1904, 1910-1913 (1986).

Moreover, as argued by Appellants in the Jurisdictional Statement, the very actions of the Texas appellate courts with regard to the Appellants' appeal on the merits was an unconstitutional violation of the due process and equal protection clauses, Jur. Stmt, pp. 45-52, and this Court has held that where a state procedural ground is utilized in an unconstitutional manner in order to evade a decision on federal questions, such ground cannot deprive the Supreme Court of appellate jurisdiction with respect to the federal questions. *Ward v. Board of County Comrs of Love County*, 253 U.S. 17, 22-23 (1920) and *NAACP v. Alabama ex rel Patterson*, 357 U.S.

449 (1958).[8]

In addition, the Court has rejected a state procedural ground where it seems "novel" or contrary to prior state law. ***NAACP v. State of Alabama ex rel Patterson***, *supra* ("novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, ***in justified reliance upon prior decisions***, seek vindication in state courts of their federal constitutional rights"; 357 U.S. at 457-8). In ***James v. Kentucky***, 466 U.S. 341, 104 S.Ct. 1830, 1835-6 (1984), the Court, in rejecting a state procedural ground as independent and adequate, stated that the law with respect to such ground "is not the sort of firmly established and regularly followed state practice that can prevent implementation of

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8. See also ***Reece v. State of Ga.***, 350 U.S. 85 (1955); ***Bowie v. City of Columbia***, 378 U.S. 347 (1964); ***NAACP v. Alabama ex rel. Flowers***, 377 U.S. 288, 296-301 (1964); ***Terre Haute & Indianapolis Ry. co. v. Indiana ex rel Ketchum***, 194 U.S. 579 (1904); and ***James v. Kentucky***, 466 U.S. 341 (1984), cert den. (1985), 105 S.Ct. 1849.

federal constitutional rights". To the same effect see *Barr v. City of Columbus,* 378 U.S. 146 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *Parrot v. City of Tallahassee*, 381 U.S. 129 (1965) (relating to inadvertent failure to obtain certification of the trial court record) and *Sullivan v. Little Hunting Park*, 396 U.S. 239, 233-235 (1969) (the Court held that the state court decisions "do not enable us to say that the Virginia court has so *consistently applied* its notice requirement as to amount to a self-denial of the *power* to entertain the federal claim here presented ....").

In sum, whatever the test, rule or principle applied,[9] the actions of the Texas court of appeals and supreme court, to the extent that they circumvented the federal constitutional issues pertaining to Rule 215, should not be accepted as an adequate state ground and the Appellees' motions to dismiss should be denied.

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9. And there are other reasons which suggest that the state ground in this case was so implausible as to require rejection of it as

IV.

In the alternative, Appellants ask the Court to accept the appeal as a petition for certiorari under 28 U.S.C. 1257(3) and grant certiorari.

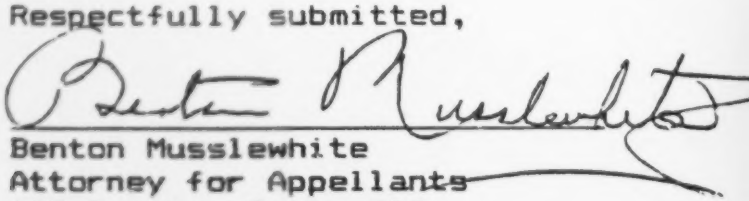
The Court has on numerous occasions, when in doubt about jurisdiction under 1257(2), taken it upon itself to consider the jurisdictional statement as a petition for certiorari and then granted certiorari. See, e.g., *Kulko v. California Superior Court*, 436 U.S. 84 (1978), reh den. 98 S.Ct. 3127; *Calder v. Jones*, 465 U.S. 783, 787, 788 (1984) and *Addington v. Texas*, 441 U.S. 418, 422, 423 (1975). In the alternative, we ask the Court to do likewise in this case.

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independent and adequate. These include the fact that the Court will not allow the state courts to circumvent federal or constitutional issues through "arid procedural rituals", *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) and *Wright v. Georgia*, 373 U.S. 284 (1963); and the rule that state courts must "afford a reasonable opportunity for asserting federal rights, without placing unreasonable obstacles in the way", Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4027, pp. 740, *Davis v. Wechsler*, 263 U.S. 22 (1923); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925); *National Mutual Bldg & Loan Assn v. Brahan*, 193 U.S. 635 (1904); and *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

WHEREFORE, Appellants pray the Court to deny Appellees' motions to dismiss, accept jurisdiction under 28 U.S.C. 1257(2) or, in the alternative, grant certiorari jurisdiction under 28 U.S.C. 1257(3).

Respectfully submitted,



Benton Musslewhite
Attorney for Appellants
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Houston, Texas 77002
(713) 222-2288

APPENDIX S

NO. 85-0701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR	]	IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS
vs	]	
DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER	]	19TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL WITH RESPECT TO COURT'S ORDER DISMISSING PLAINTIFFS' CASES PURSUANT TO RULE 215

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause and move the Court for a New Trial, Reconsideration and Reinstatement of this cause of action and for such Motion would respectfully show the Court:

I.

This Court, on June 13, 1986, dismissed this case under the sanctions provided for in Rule 215 T.R.C.P. The Plaintiff would show that the Court erred in dismissing

such case, pursuant to such sanctions rule, for the following good and sufficient reasons:

1. Rule 215, considered together with Rule 166b and the other rules of civil procedure, establish a reasonable cut-off, with respect to Supplementation of Anaswers to Interrogatories, of not less than thirty (30) days prior to trial of the case on the merits. The only issues in question here are the Answer to Interrogatories Nos. 9, 10 and 22. Those supplemental answers were filed on June 13, 1986 wth the exception of the question of other hospitalizations of the Decedent. The surviving husband, who is now in the penitentiary, does not know the answers to that question and therefore it has been to impossible for Plaintiffs' counsel to obtain the answer to that question. Where it is impossible for a Plaintiff to answer a question, the failure to answer such question cannot be the subject of a

dismissal under Rule 215 of any other sanctions rule. Thus, all the answers that could be filed by the Plaintiffs which respect to Interrogatories Nos. 9, 10 and 22, were filed on or before June 13, 1986 and such date was far in excess of thirty (30) days in advance of the trial of this case. Wherefore, it was error to utilize the drastic sanctions of dismissal.

2. The Court failed to utilize sanctions consistent with any purported violation. Assuming that Plaintiffs should have answered Nos. 9, 10 and 22 more fully, the failure to do so on the time schedule set by the Defendants did not justify the drastic sanction of dismissal but, at the most, justified a sanction of imposition of attorney fees. The Court erred in failing to temper the sanction to the purported violation involved. As Judge Kilgarlin of the Supreme Court pointed out in his Article in St. Mary's Law Journal, 15 St. Mary's Law Journal 767, et seq.,

Rule 215 is to be construed so as to bring about, in accordance with Rule 1, the "just adjudication of substantive rights". He points out that the main purpose of the sanctions in Rule 215 is "to insure that the abuser does not profit by his wrong and that his adversary does not suffer by it", id. 774, 775 and that the essential purpose of Rule 215 is to prevent either party from being unduly and unfairly surprised at the trial of the case. Id. @ p. 770. That is the reason that there was written into Rule 166b, as well as into Section 5 of the Rule 215, a thirty (30) day time limit - that is providing all information requested, including answers to interrogatories, supplementation of interrogatories, designation of experts, and the like. The Defendants have now been provided with all the information we can provide in answer to interrogatories Nos. 9, 10 and 22, and such information was provided far more than thirty (30)

days in advance of the trial date.

3. The imposition of the drastic sanction of dismissal in the context of this case constitutes a violation of the Plaintiffs' due process rights, under both the Constitution of the United States and the Texas Constitution. As Judge Kilgralin, in his St Mary's Law Journal Article, noted:

"Even if fair notice and hearing are govern, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovry sanction orders in general. *Compagnie des Bauxites*, it is submitted, holds that for a sanction decree to pass constitutional muster *it must be just, and be specifically related to the harm done by the condemned conduct.* The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. *The second standard requires that the remedy for the subject discovery abuse be tailured to redress the resultant prejudice to the other party.* Examination of the sanctions authorized by Rule 215(2)(b) *must be made with these due process concerns in mind."* Id. at pp. 795-796.

Judge Kilgarlin also noted in connection with the drastic sanction of dismissal:

"These sanctions are termed the 'ultimate' or 'extreme' sanctions. *It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith or due to some fault of the disobedient party* (citing *Societe Internationale Pour Participations Industrielles vs. Rogers*, 357 U.S. 197, 212 (1958) ... Other circumstances may call for the harsh sanction of final dismissal (or sanctions tantamount to final dismissal; but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather thanon the merits it *must exercise caution*". id. at pages 800 and 802.

Moreover Judge Kilgarlin stated that the Court should consider "eventual compliance with the rule ... in devising an appropriate order (imposition sanctions)". id. @ p. 804. It is clear that this Court has unduly and unnecessarily, in violation of the due process rights of these Plaintiffs, taken away their right to have their day in court. Even if it be assumed that Plaintiff should have supplemented Answers 9, 10 and 22 in accordance with the schedule set by the Defendants, the

most that this Court should have done, in imposing sanctions, is to assess attorneys fees against the Plaintiff and his attorney for the time expended by the Defendant in preparing their Motion for Sanctions and attending the hearing on sanctions.

4. Also, considering the affidavit filed by Plaintiffs' counsel and the fact that the Plaintiff himself - that is, the surviving husband - is in the penitentiary and the minor is not at this time living with him, such situation constitutes "good cause" for the failure to file answers to Interrogatories nos. 9, 10 and 22 prior to June 13, 1986. Therefore, the Court erred in imposing the drastic sanctions of dismissal.

5. The Court erred in imposing the drastic sanctions of dismissal because it relied upon an affidavit which was filed *the date of the hearing and of which the Plaintiffs and Plaintiffs' lead counsel*

did not have due notice. The Court should have rejected the filing of said affidavit at the last minute and on the date of said hearing, or continued the hearing to a later date. Particularly is this true since Plaintiffs' lea counsel could not be present due to being in trial in another Court. As the affidavit attached hereto reflects, the counsel who handled the matter, Ms. Susan Ashley, was not familiar enough with the file to be able to respond to such affidavit on the spot. It was totally unfair and lacking in due process for the Court to grant the filing of said affidavit on the date of the hearing without giving the Plaintiff a chance to respond and certainly without giving the Plaintiffs' lead counsel a chance to be there in order to respond. Such action of course not only violated the due process rights of the Plaintiffs but constituted an abuse of discretion in going forward on the basis of such an affidavit. Without

such affidavit, the record in this cause is clearly insufficient to justify the imposition of the drastic sanction of dismissal.

6. For other and sufficient reasons, your Plaintiff would show that the Court erred in imposing the drastic sanction of dismissal.

II.

Therefore, Plaintiffs respectfully request the Court to grant a new trial and reinstate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray the Court to grant such new trial and/or reconsideration and reinstatement of this case upon the Docket.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: _____

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
713/222-2288
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for New Trial with Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant to Rule 215 was mailed to all counsel of record, by placing same in U.S. Mail, postage pre-paid on this the 14th day of July, 1986.

_____

Benton Musslewhite

APPENDIX T

NO. 10-86-176-CV

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT WACO

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

Appellants

vs.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Appellees

*

BRIEF FOR APPELLANTS

Benton Musslewhite
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609 Fannin, Suite 517
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(713) 222-2288
Attorney for Appellants

POINTS OF ERROR

I.

If the District Court was correct in its apparent view that the answers to the three interrogatories in question were somehow deficient, it nevertheless erred in failing to make a specific determination to that effect, specifying how they were deficient and enter a clear order to compel with an opportunity for Plaintiffs to comply, before utilizing the drastic sanctions of dismissal with prejudice.

POINT OF ERROR

II.

The District Court erred in holding, if it did, that the Plaintiffs had not adequately answered the three interrogatories of which Defendants complained, particularly in view of the undisputed facts that Plaintiff (Gary Elliott) provided all the information within his knowledge and the questions

concerning specific acts of negligence were premature, would be better handled by Defendant's special exceptions and, in any event, were answered to the best of Plaintiff's ability pending the depositions of the Defendant doctor and attending nurses.

POINT OF ERROR

III.

The District Court erred in granting the drastic sanction of dismissal with prejudice because:

(a) It is undisputed that with the Plaintiff Gary Elliott being incarcerated in the State Penitentiary, and the other undisputed facts and circumstance of this case, good cause existed for the delay in answering the Hillcrest interrogatories and the Lewin interrogatories, the latter being almost precisely the same as the Hillcrest interrogatories;

(b) It is undisputed that Plaintiffs made a good faith effort to answer all of the interrogatories to the extent of their

knowledge and considering the fact that the depositions of the Defendant doctor and Hospital nurses had not yet been taken;

(c) It is undisputed that Defendants, who apparently were not satisfied with three of the Plaintiffs' answers to their interrogatories, never did ask the Court to determine whether Plaintiffs' answers were, under the circumstances of this case, actually deficient as they contended, and, if the Court deemed them deficient, to enter a clear order to that effect with a reasonable time given Plaintiffs to comply;

(d) It is undisputed that no prior specific order to compel or to require discovery was ever entered by the Court or ever disobeyed by the Plaintiffs;

(e) The Plaintiff filed responses to the interrogatories, responses to the Defendants' sanctions motions, a motion for new trial and presented testimony at the hearing on the Motion for New Trial,

all indicating reasonable explanations why the three questions of which the Defendants complained could not be more completely answered;

(f) The Defendants alternatively sought, yet the Court never considered, lesser sanctions such as attorneys fees and expenses;

(g) At the very most, the Court should have utilized no greater sanction than dismissal without prejudice;

(h) There was absolutely no evidence of bad faith, contumacious conduct, willfulness or gross negligence on the part of Plaintiffs' counsel or any default or neglect on the part of the individual Plaintiffs; and

(i) There was absolutely no evidence of any prejudice to the Defendants by any delay in answering the interrogatories; the case was not set for trial; Plaintiffs offered to supplement (e.g. re experts) the interrogatories as soon as the

depositions of the Defendant Doctor and the Hospital's nurses were completed and as more information became available; and Plaintiffs offered to sign releases and make themselves and all witnesses, including experts, available for depositions long before the trial would be set.

POINT OF ERROR

IV.

The District Court erred in granting the drastic sanction of dismissal with prejudice in this case because such action violated the constitutional rights of the Plaintiffs under the Texas and U.S. Constitutions, particularly the 14th Amendment of the U.S. Constitution, because such sanction was unjust; was not tempered to the alleged abuse, if any; was applied without any prior evidence or finding of bad faith or contumacious conduct on the part of the Plaintiffs or their attorneys; was applied without any

prior clear warning or order of the Court to the Plaintiffs so as to give them a reasonable opportunity to comply with a court order; and for all the reasons asserted in Point III above.

ARGUMENT AND AUTHORITIES

While in this case we do not take the position that interrogatories 9 and 10 called for irrelevant information, we do point to **General Motors Corporation vs. Lawrence** as an indication that the Supreme Court will not tolerate sanctions or even orders to compel answers to questions of which the answering party has no knowledge. This point is made even more clear by the Supreme Court of the United States. In **Societe Internationale Pour Participations Industrielles vs. Williams P. Rogers, Jr., et al.**, 357 U.S. 197 (1958), the Supreme Court made it clear that a party cannot be compelled - and certainly not sanctioned with respect thereto - to produce information of which

it has no knowledge or over which it has no control. The Court held that even where a party has "constructive control" over information or documents, even though it may be a technical violation of the discovery rules not to produce such information or documents, the drastic sanction of dismissal cannot be employed and to do so would violate the constitutional rights of the party against whom it would be employed. See discussion under IV below. In **Hammond Packing Co. vs. Arkansas**, 212 U.S. 322, sanctions were upheld, but the Court went out of its way to make it clear that sanctions cannot be employed ". . *for a failure to do that which it may not have been in its power to do*". 212 U.S. at 347; emphasis added.

* * *

The lead case in setting the parameters with respect to utilization of the "ultimate sanctions" is Societe Internationale vs. Rogers, supra. The

Supreme Court made explained that not only are there constitutional limitations, see discussion under IV., infra, but that the rule itself, as does Rule 215 of T.R.C.P., is subject to important limitations, to wit:

> "In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfullness, bad faith, or any fault of petitioner, (that is the plaintiff himself)".

* * *

EVEN IF THE COURT IMPOSED SANCTIONS WITHIN THE FRAMEWORK OF RULE 215, SUCH IMPOSITION OF SANCTIONS WAS UNCONSTITUTIONAL

As Judge Kilgarlin stated in 15 St. Mary's Law Journal, 795 and 796:

> "Before imposing sanctions for the violation of any discovery request or order, the non-complying party must be given notice and a hearing. Not only are these safequards required by Rule 215, but due process also demands that the allegedly derelict party be

> afforded reasonable notice and opportunity to be heard before sanctions are invoked. Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee articulated due process requirements that seem applicable to discovery sanction orders in general. Compagnie des Bauxites, it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done be the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2) (b) must be made with these due process concerns in mind.

These due process requirements are affirmed throughout the federal court cases and also the Texas cases. See Affanato vs. Muier Brothers, supra; Fisher vs. Marubeni Cotton Corporation (see discussion under headnote 5); Insurance Corporation of Ireland vs. Compagne des Bauxites de Guinee 456 U.S. 694 (1982);

Hovey vs. Elliott, 147 U.S. 407, (1987); Hammond Packing Co. vs. Arkansas, supra, (see discussion under footnote 9); Societe Internationale vs. Rogers, supra; Lueg Tewell, supra; Plodzik vs. Owens Fiberglass Corporation; Phillips vs. Vinson Supply Co., the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make the necessary corrections, deprived the Appellant of due process and (the Court) abused his discretion in failing to utilize other remedies available to him to assure compliance with the order"; 581 S.W. 2d at p. 792; and Sears Roebuck & Co. vs. Hollingsworth, supra. Indeed, as stated in Insurance Corporation of Ireland vs. Compagne des Bauxites, Rule 37 of the Federal Rules of Civil Procedure establishes the outerlimits of the

constitutional limitation upon sanctions orders. Thus, even if an order complies with Rule 215 of the Texas Rules of Civil Procedure, it violates the due process clause of the Constitution of the United States, if it nevertheless violates Rule 37 F.R.C.P. This becomes important because Rule 37 F.R.C.P., and the cases construing it, mandate that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, in all probability the statement in Rule 215 that a court can impose even the lesser sanctions, without first issuing such a discovery order, violates the constitution of the United States.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the District Court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed facts that the Plaintiffs attempted to respond to the interrogatories; they gave a reasonable explanation as to why there was a delay in responding; they attempted in good faith to answer all the questions to the best of their ability; the Plaintiffs at no time violated any prior order of the Court; the Court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers or by the alleged deficiencies in the answers to interrogatories 9, 10 and 22. What the Court below did reminds us of the

oft-quoted and famous statement of Judge Black's dissent in Link v. Wabash, 370 U.S. 648, as follows:

> "When we allow the desire to reduce Court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name. . . . Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overszealous protection of trial court dockets.

370 U.S. at pp. 648, 649.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Appellants pray that this cause be reversed and remanded to the

District Court for completion of discovery and trial on the merits.

Respectfully submitted,

By: _____

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was mailed and/or hand delivered to all attorneys of record on this the 26 day of , 1986.

_____

Benton Musslewhite

APPENDIX U

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually And
As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

*

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
713/222-2288

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually
And As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

COMES NOW, the appellants in the above numbered cause and moves the Court of Appeals for a Rehearing upon their opinion on an Order dated August 13, 1987 and for such Motion would respectfully show the Court:

Your Appellants would respectfully show that the Court of Appeals erred in the following respects:

* * *

V.

The Court of Appeals further erred in failing to decide the question whether or not the District Court had properly tailored the particular sanction used in the case before it. Once again, this Court of Appeals could easily make that determination because it had before it the same record that the District Court had before it, namely the transcript that was before this Court of Appeals. Based upon a review of that transcript it is clear that the District Court did in fact violate the due process rights of the plaintiffs as defined in **Insurance Co. Corporation of Ireland vs. Compagnie-Des Bauxites**, 456 U.S. 694 (1982). After this Court states that it can not determine anything because it has no record before it, it turns right around and states that "the record (apparently before it) reflects that plaintiffs-appellants were given notice of and participated through counsel in the

sanction hearing". If this Court can address the record to make that determinatin, why can it not address the record to determine the other issues which were duly raised by the appellant in this appeal? Therefore, it is clear that when the Court reviewed the record that was before it, being the same record that was before the District Court at the time it made the sanction dismissal, it could only reach one conclusion and that is that the due process rights of the plaintiffs had been indeed completely and utterly violated.

It is clear that we have a situation here, when reduced to its simple essence whereby the plaintiffs answered the interrogatories submitted to them; the defendants complained that three of the interrogatories submitted to them had not been answered completely; the plaintiffs made it clear in supplemental answers and in answers to interrogatories submitted by

a co-defendant that they had answered those interrogatories ot the best of their ability and that they had given all the information that they had in their possession; that the case had not been set for trial; that the Court has not entered any prior order specifically directing the plaintiffs to answer such interrogatories more fully or else be subject to sanctions; the Court had not considered the question of whether or not the answers to the interrogatories were adequate; there was absolutely no showing of prejudice that could be sustained by the defendants by the delay in answering the interrogatories or by the fact that they had not been answered as fully as defendants would like; the defendants had made no effort whatsoever to mitigate any possible prejudice by taking the depositions of the parties or sending out interrogatories to the in-laws of the plaintiff Gary Elliott who was

incarcerated in the penitentiary; the District Court clearly failed and refused to take into consideration that the Plaintiff was incarcerated inhe penitentiary and alienated from the in-laws who had custody of his child; and that there was absolutely no evidence, pleadings, or otherwise, in the record before the District Court, being the same record that was before the Court of Appeals, which would indicate in any way that the plaintiffs or their attorneys were guilty of bad faith or acting willfully. Affirming a dismissal under those circumstances is but a further extensin of the violation of due process and erroneous application of the Rules of Civil Procedure that had been effectuated by the District Court. We respectfully request this Honorable Court to reconsider its decision; to grant a rehearing; and reverse the District Court below and Order this Court restated for completion of

discovery and trial upon the merits.

Respectfully submitted,

THE LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: _____

Benton Musslewhite
609 Fannin, Ste. 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

APPENDIX V

NO. C-6869

IN THE
SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIED OF
SHAUNA MARIE ELLIOTT, A MINOR CHILD,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

AMENDED
PETITION FOR WRIT OF ERROR

On behalf of GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR, Appellants in Cause No. 10-86-176-CV in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, Texas, wherein GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIED OF SHAUNA MARIE ELLIOTT, A MINOR, are Appellants and Dr. Marcial Lewin and Hillcrest Baptist Medical Center are Appellees.

BENTON MUSSLEWHITE
609 Fannin, Ste. 517
Houston, Texas 77002
(713) 222-2288
Attorney for Petitioners

NO. C-6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

AMENDED PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

On behalf of GARY ELLIOTT, Individually, and as next friend of SHAUNA MARIE ELLIOTT, A Minor, Petitioners herein, Petition for Writ of Error is sought with respect to Cause No. 10-86-176-CV in the Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco, wherein GARY ELLIOTT, Individually, and as next of friend of SHAUNA MARIE ELLIOTT, A Minor, were

Appellants and Dr. Marcial Lewin and Hillcrest Medical Center were Appellees. As stated above, this instrument is an application for Writ of Error. The attorney for the Petitioners is Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002, (713)222-2288, TBA # 14752000. This Application for Writ of Error is being filed on this 26th day of October, 1987.

* * *

In addition, with respect to subsection a(3), Section 22.001, Petitioners would show that this case involves construction of Rule 215 of T.R.C.P. concerning sanctions dismissals and a construction of various constitutional provisions such as the 5th and 14th Amendments to the Constitution of the United States, involving due process. In particular, this case involves the important question of whether or not Rule 215 allows a

dismissal with prejudice of a case where the plaintiffs have attempted to answer the interrogatories in question; disclosed all the information that they had knowledge of or could reasonably find out; there was no allegation of any prejudice to the defendants which would arise froma refusal to dismiss with prejudice; there were not allegations of any bad faith of contumacious conduct on the part of the plaintiffs or their attorneys; the drastic sanction of dismissal was obtained without defendants first obtaining an order compelling discovery or a specific order of discovery; and there was no showing of any violation of a prior discovery order.

Subsection a(6) of Section 22.001 also supports jurisdicti before the Court because all of the rrors complained of in this case are rrors of substantive law which have tremendous importance to the law of this state. This is true for four primary reasons:

(a). The Court of Appeals incorrectly held that the appeal could not be resolved on the basis of the Transcript even though no evidence was offered at the hearing on sanctions other than the affidavit of counsel for Respondent Hillcrest, which affidavit stated was, according to hillcrest, consistent with the statement of facts contained in its Brief before the Court of Appeals; the Transcript disclosed that no party had alleged bad faith or contumacious conduct on the part of Plaintiffs or that Defendants had been prejudiced, thus the Motions for Sanctions did not support the drastic sanction of dismissal; the Transcript disclosed that no prior discovery order had been issued or violated by Plaintiffs; the Transcript disclosed that Plaintiffs has made a good faith effort to answer the three interrogatory answers complained of; and the Defendants did not dispute Plaintiffs

statement of those facts in their briefs before the Court of Appeals in any material respect.

(b.) In holding, by implication, that the facts of this case justified the drastic sanction of dismissal with prejudice.

(c.) In holding, by implication, that the district court should not have first issued a discovery order or at least resorted to lesser sanctions in view of the fact that no prior discovery order had been violated; good faith effort to comply with the discovery requests had been made; and no prejudice had been shown.

(d). And in holding, by implication, that the district court, in dismissing with prejudice, had not violated the Plaintiffs' due process rights under the U.S. Constitution, particularly the 5th and 14th Amendments.

POINTS OF ERROR

I.

The Court of Appeals erred in failing to decide the matters of the appel on the basis of the Transcript, because no evidence other than an affidavit tendered by the Defendants' counsel was offered at the sanctions hearing, which affidavit Respondents stated was consistent with their statement of the facts in their Brief before the Court of Appeals; the Transcript conclusively established that the action of the district court in granting the ultimate sanctin of dismissal with prejudice was erroneous; the "pleadings" (motions for sanctions) of the Defendants, which were in the Transcript, did not allege sufficient grounds for the granting of the ultimate sanction; and the Defendants, in their Briefs before the Court of Appeals, did not contradict the Plaintiffs' statement of the facts in their Brief on appeal in any material respect. (Germane to assignments of Error Nos. I, II, III and IV of Motion for Rehearing.)

II.

The Court of Appeals erred in impliedly upholding the action of the district court in granting the most drastic sanction of all, dismissal with prejudice, because no bad faith or contumacious conduct had been alleged or shown; no prejudice to Defendants has been alleged or shown; Plaintiffs respo ded in good faith to the interrogatories in question, to the best of their ability to do so; Plaintiffs attended all arings set by the district court; the case was not set for trial; and

Defendants had not attempted, prior to seeking dismissal, to have the district court determine whether the Plaintiffs should be ordered to take any further action with respect to the three interrogatories which Plaintiffs had attempted to answer but Defendants still complaed of. (Germane to Assignments of Error Nos. III, IV and V of Motion for Rehearing.)

III.

The Court of Appeals' implied decision, upholding the district court's dismissal with prejudice, erroneously permits the violatinof Plaintiffs' constitutional rights, particularly their rights under the 5th and 14th Amendments to the Constitution of the U.S. (Germane to Assignment of Error No. IV. of Motion for Rehearing.)

* * *

(3). Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it is unconstitutional.

As Judge Kilgarlin stated in St. Mary's Law Journal, 795 and 796:

"Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp of Ireland v. Companies des Bauxites de Guinee articulated due process requirements that seem applicable to

disocvery sanction orders in general. Compagnie des Bauxites, it is submitted, holds for a sanctin decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery aubse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2)(b) must be made with these due process concerns in mind." (Emphasis ours).

These due process requirements are affirmed throughout the federal and Texas cases. See *Affanato v. Mel Brothers, supra; Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338 (8 Cir. 1975) (see discussion under headnote 5); *Insurance Corp. of Ireland v. Compagne des Bauxites de Guinee*, 456 U.S. 694 (1982); *Hovey v. Elliott*, 147 U.S. 407 (1897); *Hammond Packing Co. v. Arkansas, supra; Societe Internationale v. Rogers, supra; Luep v. Tewell*, 572 S.W.2d 102 (Ct. of App.); *Plodzik v. Owen Fiberglass Corp.*, 549 S.W.2d 52 (Ct. of App, Austin 1977);

Phillips v. Vinson Petroleum Supply Co., (the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make necessary corrections, deprived the Appellant of due process and abused his discretion in failing to utilize other remedies available to him to assure complaince with the order", 581 S.W.2d at p. 792.); and *Sears Roebuck & Co. v. Holingsworth, supra.* Indeed, as stated in *Insurance Corp. of Ireland v. Compagne de Bauxities,* Rule 37, of the F.R.C.P., establishes the outer limits of the constitutional restrictions upon sanctions orders. Ths, evenif an order complies with Rule 215 of the T.R.C.P., as construed by the district court in this case, it violates the due process clause of the Constitution of the United States if it nevertheless violates Rule 37 of the

F.R.C.P. This becomes important because Rule 37 of the F.R.C.P. and the cases construing it, mandates that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, it is quite possible that the statement in Rule 215 that a court can impose sanctions (including, impliedly, the ultimate sanction) witout first issuing such a discovery order, vioaltes the Constitution of the United States.

CONCUSION AND PRAYER

We respectfully suggest that grant of Writ of Error in this case is vital to the continued efficacy of Rule 215. We state once again that the Court should provide the district courts with more definite

parameters to guide them in the future in the use of their discretion under Rule 215.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the district court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed procedural facts that the Petitoners attempted in good faith to answer all the interrogatories to the best of their ability to do so; they at not time violated any prior order of the Court; the district court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers to interrogatories 9, 10 and 22. ....

* * *

WHEREFORE PREMISES CONSIDERED, Petitioners pray this Court grant Writ of Error and upon hearing reverse and remand this case to the District Court for trial on ther merits.

Respectfully submitted,

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA # 14752000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition for Writ of Error was served upon all attorneys of record, by Certified Mail, Return Receipt Requested or by hand delivery, on this 26th day of October, 1987.

Benton Musslewhite

APPENDIX W

NO. C 6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

MOTION FOR REHEARING AND RECONSIDERATION
OF PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, the Petitioners and move the Honorable Court for a rehearing and reconsideration of the Petitioner's Petition for Writ of Error and for such Motion would show:

I.

Petitioners admit technically they were

late in filing answers to Respondents' interrogatories. But is is undisputed that they were filed, about seven months before the sanctions hearing in questin was conducted. Between the date they were filed and the sanctins hearing, that seven month period, *only* the following happened:

(a). The Respondents complained of only three interrogatory answers.

(b). The Petitioners made it further clear that ehy simply did not know the answers to two of the interrogatories and supplemented their answers to the third by listing the specific acts of negligence (even though the third - was a question askng for Plaintiffs' specific grounds of negligence - was premature and should have been handled by a hearing on special exceptions and Plaintiffs were about to take the depositions of the doctors and hospital personnel, which would have enabled Plaintiffs to accurately list the specific acts of negligence).

(c). Petitioners adequately explained the delay in answering the interrogatories - the adult Petitioner was in the state penitentiary all through the litigaton and it had been difficult to get the answers completed.

(d). Respondents attempted no further discovery.

(e). Respondents did not ask for a hearing to determine whether the three interrogatory answers were inadequate and no such hearing was held.

(f). The Court had not set any discovery deadlines.

(g). The case was not set for trial.

(h). The Court had issued no discovery orders of any kind.

(i). No motion to compel had been filed and no order to compel had been issued.

(j). The Petitioners had not missed any hearings and attended the sanctions hearing in question.

(k). Petitiors filed a written

response to Respondents' Motion for Sanctions.

(l). Petitioners had noticed and scheduled the depositions of the Defendant Doctor and Personnel at the Defendant hospital.

(m). Petitioners had (in their response) agreed to a self-imposed deadline - even though none had been imposed by the Court - of providing Respondents with the names of their experts.

(n). Nothing *else* - but the alleged failure to answer interrogatories constituted the basis for the Respondents' Motion for Sanctions and, as stated above by the time of the sanctions hearing, Petitioners had answered ***all*** but two of the interrogatories and did not answer those because they ***simply did not know the answers to the questions asked.***

(o). ***All of the foregoing was indisputably established in the Transcript***

before the Court of Appeals. The Transcript was certified as complete by the Clerk. See Transcript.

* * *

III.

Thus, with these undisputed certainties, it is clear that the Writ of Error should be granted, and at the least a per curiam decision entered, for the following reasons:

(a). The pleadings (Motion for Sanctions) were limited to a request for sanctions based *solely* upon the alleged failure to answer the interrogatories, which interrogatories, and the answers thereto, were in the Transcript. Therefore, the action of the District Court was limited to the allegations in the motions and, since those allegations, as a matter of law, did not support the snactin of dismissal (considering that answers were filed as established by the Transcript), the Court of Appeals did not

need a statement of facts in order to consider the merits of the appeal and to reverse. **Weatherell v. Weatherell**, 403 S.W.2d 347 (Ct. of App., Houston 1966); **McEntire v. McEntire**, 706 S.W.2d 347 (Ct. of App. 1986); **DeGarcia v. San Antonio & S.P. Ry. Co.**, 77 S.W. 275 (Ct. of App., San Antonio, 1915; writ ref.); 4 Tex. Jur. 3d, Sect. 349, at pp. 479, 480, and the cases there cited. See also pp. 22, 27 of Petition for Writ of Error.

(b) The briefs before the Court of Appeals established that there was no dispute about the material "facts" and that all of such material "facts" were contained in the Transcript. Thus, the Court of Appeals did not need a statement of facts in order to consider the merits of the appeal and to reverse. **Whatley v. Whatley**, 493 S.W.2d 299 (Ct. of App., Dallas, 1973); **Sarri v. Christie**, 217 S.W.2d 99 (Ct. of App., Dallas 1949); **Johnson v. Texas Board of Chiropractic**

Examiners, 449 S.W.2d 145 (Tex. Civ.App. Amarillo 1969, no writ); **City of Houston v. Lakewood Estates, Inc.**, 429 S.W.2d 938 (Tex Civ App., Houston 1st Dist., 1968, writ ref'd n.r.e.); **American Security Life Ins. Co. v. M. D. Anderson Hospital and Tumor Institute**, 408 S.W.2d 155 (Tex. Civ. App., Houston 1st Dist. 1966, writ dismissed); **Rancher v. Franks**, 269 S.W.2d (Tex. Civ.App. Fort Worth 1954, no writ) and see pp. 20-22 of Petition for Writ of Error.

(c). The District Court's order by limiting the grounds for dismissal to discovery abuse, which in turn necessarily turned on the discovery requests in the Transcript, could be considered on its merits ***solely*** from the Transcript, without a statement of facts, and the Court of Appeals should have reversed on the basis of the terms of the order, in the light of the Transcript, because the order and the Transcript did not support the drastic

sanction of dismissal, see pp. 23-25 of Petition and the cases there cited.

(d). The failure to consider the Petitioners' appeal on its merits constituted a violation of the Rules of Civil and Appellate Procedure, the Texas Constitution, the United States Constitution and existing case law.

(e). On the merits, resort to the drastic sanction of dismissal violates Rules 215 and other rules of the Texas Rules of Civil Procedure and existing case law.

(f). If such action does not violate Rule 215 T.R.C.P. by permitting dismissals where answers to interrogatories have been filed, where no prior order of discovery has been violated, where and when there is no allegation of bad faith of contumacious conduct - then either Rule 215 is unconstitutional under the Constitution of the United States or the dismissal is, in itself, a deprivation of due process and

thus a violation of the United States Constitution. See **Societe Internationale Pour Participations INdustrialies v. Rogers**, 357 U.S. 199 (1958).

What the bottom line is in this case is whether this Court, the highest court of our state, is going to tolerate the stripping of the minor child's sacred rights to a trial by jury simply because, throught no fault of her, her only surviving parent is incarcerated int he state penitentiary and thus unable to respond to interogatories expeditiously and to answer two questions which he did not know the answers to and, because he was incarcertated, could not go out and try to find out the answers to those two questions. That is the sum and substance of all that the District Court - based upon the Motions for Sanctions, the Transcript and its own order - could possibly have based its **dismissal with prejudice on.**

* * *

WHEREFORE, we pray this Court to right this terrible wrong and rehear and reconsider the Petition for Writ of Error in this case and grant such Petition or enter a per curiam opinion ordering the Court of Appeals to consider the appeal on its merits.

Respectfully submitted,

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Attorney for Petitioners

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1699

*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

*

GARY ELLIOTT, et al.,
Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL,
Appellees.

*

On Appeal from the Supreme Court of
the State of Texas

*

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

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App. T: Excerpts from Brief of Appellants (filed in the Texas court of appeals)

App. U: Excerpts from Motion for Rehearing of Appellants (filed in the Texas court of appeals)

App. V: Excerpts from Amended Petition for Writ of Error (filed in the Texas supreme court)

App. W: Excerpts from Motion for Rehearing and Reconsiderati of Petition for Writ of Error (filed in the Texas supreme court)

NO. 87-1699

*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

*

GARY ELLIOTT, et al.,
Appellants,

versus

DR. MARCIAL LEWIN and
HILLCREST BAPTIST HOSPITAL,
Appellees.

*

On Appeal from the Supreme Court of
the State of Texas

*

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Appellants respectfully hereby respond to Appellees' motions to dismiss or affirm.

I.

The federal questions sought to be reviewed were properly raised in the state courts of Texas.

It is rather surprising that Appellees would so blatantly misstate the record that

was made in the Texas courts. In essence, the Appellees assert that Appellants did not raise any complaint about Rule 215, Texas Rules of Civil Procedure ("TRCP") as written "or as applied" in the Texas trial court, court of appeals or supreme court (pp. 10, 12 of Appellee Hillcrest's motion to dismiss and pp. 4, 5 of Appellee Lewin's motion to dismiss). Such statements are simply incorrect. We are filing, concurrent with this Response, Supplemental Appendices which include excerpts from: Appellants' motion for new trial in the state district court (App. S); brief of Appellants' in the state intermediate appellate court, the court of appeals (App. T); Appellants' motion for rehearing in the court of appeals (App. U); Appellants' petition for writ of error in the Texas supreme court (App. V); and Appellants' motion for rehearing and reconsideration of petition for writ of error in the Texas supreme court (App. W).

Page 5, 6 of App. S, the motion for new trial filed by Appellants in the state

district court, contains the express statements that "[t]he impositon of the drastic sanction of dismissal in the context of this case (a Rule 215 sanctions case) constitutes a violation of the Plaintiffs' due process rights, under ... the Constitution of the United States ..." and further that, quoting from Justice Kilgarlin of the Texas supreme court, the "United States Supreme Court in *Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovery sanction orders generally" and that "the sanctions *authorized by Rule 215(2)(b) must be made with these due process concerns in mind.*"

The state district court was required, as mandated by the Texas supreme court in *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 238, 241 (Tex. 1985), to consider the arguments contained in Appellants' motion for new trial and the matters argued therein are deemed to have been "properly presented" to the state

district court in sanctions proceedings. Thus, the question of the application of Rule 215 was *indisputably* raised in the district court and necessarily rejected by it when it overruled Appellants' motion for new trial (See order overruling motion for new trial, App. D).

Next, Appellants' attack upon the constitutionality of the manner in which rule 215 was applied in this case was expressly, thoroughly and vigorously argued in the Appellants' brief before the state court of appeals, see Point of Error IV and pp. 6, 7, 9-14 of App. T. The constitutional siege continued, contrary to Appellees' assertions, in Appellants' motion for rehearing filed in the state court of appeals, see pp. 3, 4, 6 of App. U. Appellants' petiton for writ of error filed in the state supreme court is exhaustive in its discussion of the constitutional issues vis-a-vis Rule 215, see pp. 3, 6, 8 of App. V,[1] and such issue is likewise raised in Appellants' motion for rehearing filed in the Texas supreme court,

pp. 8, 9 of App. W. In sum, the question of the unconstitutionality of Rule 215, ***as applied in this case***, was clearly raised and rejected in the state district court, the state court of appeals and the state supreme court and we cannot understand why Appellees, in the face of the uncontroverted record, would say differently.

As to the question of the unconstitutionality of the actions of the Texas appellate court in refusing (to the extent that it did so refuse, see discussion *infra*) to consider Appellants' appeal on its merits, contrary to Appellees' assertions that such issue was raised for the first time in the Jurisdictional Statement in this Court, such issue was expressly raised in the Appellants' motion for rehearing in the Texas supreme

---

1. For example, the heading (no. 3) on page 39 of App. V states: "Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it (the statute) is unconstitutional."

court (see App. W, pt. (d), p.8).[2]

In any event, the extent to which the constitutional issues were raised in the state courts in this case was far in excess of what this Court has required in similar circumstances. The Court, in ***New York ex rel Bryant v Zimmerman***, 278 US 63 (1928), discussed the requirement that the federal issue must be "drawn into question" in the state court, in these terms:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clearintendment that this was done, the claim is to be regarded as having been adequately presented.

278 US at 67. See also ***Dewey v Des Moines***, 173 U.S. 193, 199 (1899); and ***McGoldrick v. Compagnie Generale Transatlantique***, 309 U.S.

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2. Such issue could not possibly have been raised until in the Texas supreme court because the action complained of did not occur in the trial court but in the intermediate appellate court.

430, 434, 435 (1940) (discussing the "pressed *or* passed upon" test).[3]

Under the parameters outlined in ***New York v. Zimmerman*** and ***Dewey v. Des Moines***, there can be no doubt that Appellants vigorously "pressed", "presented" or "raised" in the state trial court, the intermediate appellate court and the state supreme court the issue of whether Rule 215, "as applied" in this case, was unconstitutional. Recent decisions of this Court clearly support this conclusion.[4]

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3. As we have noted, Appellee Hillcrest's clamor that the constitutional issues relative to Rule 215 were not raised in Appellants' motion for rehearing in the state court of appeals is just simply contrary to the record, see App. U, particularly when the terms of Rule 131, Tex. R. App. P., are considered ("Points will be sufficient if they direct the attention of the court to the error relied upon.").

4. See ***Wood v. Georgia***, 450 U.S. 261, 265 n.5 (1981); ***Three Affiliated Tribes v. Wold Engineering***, 106 S.Ct. 2305, 2309 (1986); ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74, 85, 86 n.9 (1980); ***Eddings v. Oklahoma***, 455 U.S. 104, 113, 114 n.9 (1982); ***Beck v. Alabama***, 447 US 625, 631 n.6 (1980); ***Vachon v. New Hamp- shire***, 414 U.S. 438, 479 n.3 (1984); ***Nat'l Bldg Assn v. Brahan***, 193 U.S. 635 (1904); ***Gomez v. Franscisco Ocasio Perez***,

As to the unconstitutionality of the Texas court of appeals' action in attempting to finesse the Rule 215 issue because no "statement of facts" was filed, since such issue was raised in the Texas supreme court, see p. 8, App. W, this Court has indicated that matters first raised in the state appellate court system are deemed timely raised if the actions complained of did not occur until the case reached the appellate courts. See ***Great Northern Ry. v. Sunburst Oil & Refining Co.***, 287 U.S. 358, 366 (1932); ***Missouri v. Gehner***, 281 U.S. 358, 366 (1932); ***Brinkerhoff Faris Trust & Sv. Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917); and ***Aetna Life Insur. Co. v. Lavoie***, 106 S.Ct. 1480, 1583-84 (1986). Thus, the Appellants' complaints about the actions of the state court of appeals were timely raised and presented.

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409 U.S. 535, 537-539 (1973); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282, 290 (1921); and ***Cox Broadcasting Corp. v. Cohen***, 420 U.S. 469, 476 (1975)(constitutional issue raised in appellants' "motion for rehearing in the Georgia Supreme Court").

Lastly, the question of the constitutionality of Rule 215 "as written" could possibly come within the scope of the question of the constitutionality of Rule 215 "as applied",[5] see Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4022, p. 704, and thus be considered just as timely raised as the "as applied" issue.

II.

An appeal is appropriate even where the sole argument is that the statute in question is unconstitutional "as applied", as distinguished from being unconstitutional "as written".

We concede that our attack upon Rule 215 in the state trial, intermediate appellate and supreme courts is more clearly stated in terms of the unconstitutionality of Rule 215 "as applied" to this case (See App. S, T, U and V). But, even if this is so, the Appellees are not entitled to have this appeal dismissed because the cases are legion in which the Court has authorized appeals under 28 U.S.C. 1257 (2) even though the sole

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5. However, an argument that Rule 215 is unconstitutional as written can possibly be discerned from the petition for writ of error filed in the state supreme court. (App. V, pp. 8-11).

federal question is the unconstitutionality of the manner in which a state statute has been "applied" to the facts of that particular case. ***Dahnke-Walker***, 257 U.S. at 288-290;[6] ***Calder v. Jones***, 465 U.S. 783, 788 (1984); ***Japan Air Lines Ltd v. County of Los Angeles***, 441 U.S. 434, 440, 441 (1979); ***R. J. Reynolds v. Durham County***, 93 L.Ed.2d at 459, 460; and ***Ybarra v. Illinois***, 444 U.S. 85 (1976).

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6. The Court stated: "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, *as to the transaction in question* the Kentucky statute was void, and therefore unenforceable because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but *applied* and enforced the statute. Of course, that was an affimation of its validity when so *applied*. * * * That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid *as applied* to one state of facts, and yet valid as *applied* to another. * * * Our conclusion on the jurisdictional question is that, as *the state court applied* and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so *applied* and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. * * *". (emphasis ours.)

III.

The federal and constitutional questions presented in the state courts were necessarily decided by the state courts and, to the extent that they were not decided because of state procedural grounds, such state grounds were not independent and adequate.

A. Federal and constitutional issues not only properly presented but also necessarily decided by the state courts.

The crucial issue in this case - whether the trial court's dismissal under Rule 215 was unconstitutional as applied to this case - after being expressly and squarely presented in Appellants' motion for new trial to the trial court, App. S, was necessarily "decided" by the trial court when it summarily denied the motion for new trial, App. D. After such constitutional issue was again squarely presented to the Texas court of appeals, App. T, such court, though obviously attempting to finesse or outright evade the constitutional issue, nevertheless made statements in its opinion that could be construed as a decision on the merits of the constitutional issue. App. C, pp. 4, 5. The

court of appeals there referred to Appellants' "second point ... that the court acted unconstitutionally when it imposed sanctions" (under Rule 215).

Thus, apparently the substantial question of whether it is constitutionally proper to use a sanction rule, such as Rule 215, as a basis for the drastic remedy of dismissal with prejudice "although no order has ever been entered to compel discovery" (which is exactly what happened in this case) ***was at least partially addressed*** by the court of appeals and necessarily rejected by its decision to affirm.

Furthermore, the federal questions of the constitutionality of the trial court's dismissal under Rule 215 and the court of appeals' at least partial refusal to consider Appellants' appeal on its merits, having been raised in the supreme court (App. U, V and W), were necessarily decided and rejected by the supreme court by virtue of its order denying writ of error, App. B, and its order denying a rehearing, App. A.

This Court has articulated the rule that where state court orders or judgments are silent or ambiguous as to the precise basis for their rulings, "[i]n the absence of positive assurance" or a "plain statement" to the contrary from such courts, the Supreme Court will assume that "the merits" of the federal or constitutional issues, having been raised, were decided. ***R. J. Reynolds Tobacco Co. v. Durham County***, 93 L.Ed.2d 448, 460 (1986); ***Michigan v. Long***, 463 U.S. 1032 (1983) (articulating the "plain statement" rule); ***Delaware v. Van Arsdall***, 106 S.Ct. 1431, 1441-1450 (1986); ***New York v. P. J. Video, Inc.***, 106 S.Ct. 960, 963-964 (1986); ***Caldwell v. Mississippi***, 106 S.Ct. 2633, 2638-2639 (1985); ***N.A.A.C.P. v. Claiborne Hardware Co.***, 458 U.S. 886, 102 S.Ct. 3409, 3427 n. 50 (1982); ***In Re Primus***, 436 U.S. 412, 98 SCt 1893, 1905-6 (1978); and ***Old Dominion Branch 496, Nat'l Assn of Letter Carriers v. Austin***, 418 U.S. 264, 282 (1974).

In this case, since there was no "plain statement" by the Texas trial court in

overruling Appellants' motion for new trial, nor by the court of appeals in its decision, nor by the supreme court in its order overruling the petition for writ of error[7] and motion for rehearing, to the effect that the state courts relied solely on state grounds in reaching their decisions, this Court can assume, particularly in view of the ambiguous statement by the court of appeals noted above, that the Texas courts addressed and rejected appellants' contentions that Rule 215, as applied in this case, was unconstitutional and that the action of the court of appeals, in refusing (to the extent that it did so refuse) to consider Appellants' appeal on its merits, was unconstitutional.

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7. This Court has consistently held that the denial of writ of error by a state supreme court constitutes a ruling upon the issues raised in the writ of error. See, e.g., *Atchison T. & S. F. Ry. Co. v. Public U. Commission*, 346 U.S. 346, 348, 349 (1953).

B. Even if the Court should conclude that the Texas court of appeals and the supreme court were basing their decision solely upon the state procedural ground that no "Statement of Facts" was filed in the court of appeals, the Court should still accept jurisdiction because such state procedural ground is "inadequate" under any one of a number of tests employed by this Court.

In our Jurisdictional Statement, pp. 7-25, 45-60, we clearly established that the procedural facts, necessary for the state appellate courts' decision on the merits of Appellants' contention that Rule 215 was unconstitutional as applied in this case, were fully contained in the "Transcript" which *was filed* in the court of appeals and, in any event, there was no disagreement about the essential procedural facts between the parties as reflected in their briefs before the state court of appeals and the supreme court. The court of appeals and supreme court knew full well that there was absolutely no need for a "Statement of Facts" (which is the name of the document that normally contains the testimony of witnesses who testify *at a trial on the merits*) in

order to pass upon the merits of Appellants' point of appeal that Rule 215 was unconstitutional as applied in this case. The utilization of the rationalization by the state appellate courts that they could not decide such issue without a "Statement of Facts" was obviously an unwarranted evasion of the constitutional issue and cannot constitute an "adequate" state ground for avoiding jurisdiction under 1257(2). ***Ancient Egyptian Arabic Order of Nobles of the Mystick Shaine v. Michigan,*** 279 U.S. 737 (1929).

As stated by **Wright-Miller-Cooper-Gressman, *Federal Practice and Procedure***, Vol. 16, Sect. 4021, p. 580, "[i]ndependent state grounds for decision might thwart federal rights as a matter of deliberate evasion, subtle and subconscious evasion, or simply poor judicial performance" if the Supreme Court were not to analyze the vehicle used by a state court to avoid a constitutional or federal issue. Thus, the Court always has jurisdiction to determine

whether a state procedure "is adequate" when it is used as a means of pretermitting the federal or constitutional question. *Fay v. Noia*, 372 U.S. 391 (1963); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Railway Express v. Levee*, 263 U.S. 19 (1923); and *International Longshoremen's Association v. Davis*, 106 S.Ct. 1904, 1910-1913 (1986).

Moreover, as argued by Appellants in the Jurisdictional Statement, the very actions of the Texas appellate courts with regard to the Appellants' appeal on the merits was an unconstitutional violation of the due process and equal protection clauses, Jur. Stmt, pp. 45-52, and this Court has held that where a state procedural ground is utilized in an unconstitutional manner in order to evade a decision on federal questions, such ground cannot deprive the Supreme Court of appellate jurisdiction with respect to the federal questions. *Hord v. Board of County Comrs of Love County*, 253 U.S. 17, 22-23 (1920) and *NAACP v. Alabama ex rel Patterson*, 357 U.S.

449 (1958).[8]

In addition, the Court has rejected a state procedural ground where it seems "novel" or contrary to prior state law. ***NAACP v. State of Alabama ex rel Patterson***, *supra* ("novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, ***in justified reliance upon prior decisions***, seek vindication in state courts of their federal constitutional rights"; 357 U.S. at 457-8). In ***James v. Kentucky***, 466 U.S. 341, 104 S.Ct. 1830, 1835-6 (1984), the Court, in rejecting a state procedural ground as independent and adequate, stated that the law with respect to such ground "is not the sort of firmly established and regularly followed state practice that can prevent implementation of

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8. See also ***Reece v. State of Ga.***, 350 U.S. 85 (1955); ***Bonie v. City of Columbia***, 378 U.S. 347 (1964); ***NAACP v. Alabama ex rel. Flowers***, 377 U.S. 288, 296-301 (1964); ***Terre Haute & Indianapolis Ry. co. v. Indiana ex rel Ketchum***, 194 U.S. 579 (1904); and ***James v. Kentucky***, 466 U.S. 341 (1984), cert den. (1985), 105 S.Ct. 1849.

federal constitutional rights". To the same effect see ***Barr v. City of Columbus,*** 378 U.S. 146 (1964); ***Wright v. Georgia***, 373 U.S. 284, 291 (1963); ***Parrot v. City of Tallahassee***, 381 U.S. 129 (1965) (relating to inadvertent failure to obtain certification of the trial court record) and ***Sullivan v. Little Hunting Park***, 396 U.S. 239, 233-235 (1969) (the Court held that the state court decisions "do not enable us to say that the Virginia court has so ***consistently applied*** its notice requirement as to amount to a self-denial of the ***power*** to entertain the federal claim here presented ....").

In sum, whatever the test, rule or principle applied,[9] the actions of the Texas court of appeals and supreme court, to the extent that they circumvented the federal constitutional issues pertaining to Rule 215, should not be accepted as an adequate state ground and the Appellees' motions to dismiss should be denied.

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9. And there are other reasons which suggest that the state ground in this case was so implausible as to require rejection of it as

IV.

In the alternative, Appellants ask the Court to accept the appeal as a petition for certiorari under 28 U.S.C. 1257(3) and grant certiorari.

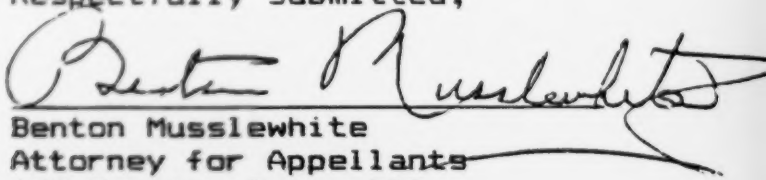
The Court has on numerous occasions, when in doubt about jurisdiction under 1257(2), taken it upon itself to consider the jurisdictional statement as a petition for certiorari and then granted certiorari. See, e.g., *Kulko v. California Superior Court*, 436 U.S. 84 (1978), reh den. 98 S.Ct. 3127; *Calder v. Jones*, 465 U.S. 783, 787, 788 (1984) and *Addington v. Texas*, 441 U.S. 418, 422, 423 (1975). In the alternative, we ask the Court to do likewise in this case.

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independent and adequate. These include the fact that the Court will not allow the state courts to circumvent federal or constitutional issues through "arid procedural rituals", *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) and *Wright v. Georgia*, 373 U.S. 284 (1963); and the rule that state courts must "afford a reasonable opportunity for asserting federal rights, without placing unreasonable obstacles in the way", Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4027, pp. 740, *Davis v. Wechsler*, 263 U.S. 22 (1923); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925); *National Mutual Bldg & Loan Assn v. Brahan*, 193 U.S. 635 (1904); and *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

WHEREFORE, Appellants pray the Court to deny Appellees' motions to dismiss, accept jurisdiction under 28 U.S.C. 1257(2) or, in the alternative, grant certiorari jurisdiction under 28 U.S.C. 1257(3).

Respectfully submitted,



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APPENDIX S

NO. 85-0701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR	]	IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS
vs	]	
DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER	]	19TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL WITH RESPECT TO COURT'S ORDER DISMISSING PLAINTIFFS' CASES PURSUANT TO RULE 215

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause and move the Court for a New Trial, Reconsideration and Reinstatement of this cause of action and for such Motion would respectfully show the Court:

I.

This Court, on June 13, 1986, dismissed this case under the sanctions provided for in Rule 215 T.R.C.P. The Plaintiff would show that the Court erred in dismissing

such case, pursuant to such sanctions rule, for the following good and sufficient reasons:

1. Rule 215, considered together with Rule 166b and the other rules of civil procedure, establish a reasonable cut-off, with respect to Supplementation of Anaswers to Interrogatories, of not less than thirty (30) days prior to trial of the case on the merits. The only issues in question here are the Answer to Interrogatories Nos. 9, 10 and 22. Those supplemental answers were filed on June 13, 1986 wth the exception of the question of other hospitalizations of the Decedent. The surviving husband, who is now in the penitentiary, does not know the answers to that question and therefore it has been to impossible for Plaintiffs' counsel to obtain the answer to that question. Where it is impossible for a Plaintiff to answer a question, the failure to answer such question cannot be the subject of a

dismissal under Rule 215 of any other sanctions rule. Thus, all the answers that could be filed by the Plaintiffs which respect to Interrogatories Nos. 9, 10 and 22, were filed on or before June 13, 1986 and such date was far in excess of thirty (30) days in advance of the trial of this case. Wherefore, it was error to utilize the drastic sanctions of dismissal.

2. The Court failed to utilize sanctions consistent with any purported violation. Assuming that Plaintiffs should have answered Nos. 9, 10 and 22 more fully, the failure to do so on the time schedule set by the Defendants did not justify the drastic sanction of dismissal but, at the most, justified a sanction of imposition of attorney fees. The Court erred in failing to temper the sanction to the purported violation involved. As Judge Kilgarlin of the Supreme Court pointed out in his Article in St. Mary's Law Journal, 15 St. Mary's Law Journal 767, et seq.,

Rule 215 is to be construed so as to bring about, in accordance with Rule 1, the "just adjudication of substantive rights". He points out that the main purpose of the sanctions in Rule 215 is "to insure that the abuser does not profit by his wrong and that his adversary does not suffer by it", id. 774, 775 and that the essential purpose of Rule 215 is to prevent either party from being unduly and unfairly surprised at the trial of the case. Id. @ p. 770. That is the reason that there was written into Rule 166b, as well as into Section 5 of the Rule 215, a thirty (30) day time limit - that is providing all information requested, including answers to interrogatories, supplementation of interrogatories, designation of experts, and the like. The Defendants have now been provided with all the information we can provide in answer to interrogatories Nos. 9, 10 and 22, and such information was provided far more than thirty (30)

days in advance of the trial date.

3. The imposition of the drastic sanction of dismissal in the context of this case constitutes a violation of the Plaintiffs' due process rights, under both the Constitution of the United States and the Texas Constitution. As Judge Kilgralin, in his St Mary's Law Journal Article, noted:

"Even if fair notice and hearing are govern, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovry sanction orders in general. *Compagnie des Bauxites*, it is submitted, holds that for a sanction decree to pass constitutional muster *it must be just, and be specifically related to the harm done by the condemned conduct.* The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. *The second standard requires that the remedy for the subject discovery abuse be tailured to redress the resultant prejudice to the other party.* Examination of the sanctions authorized by Rule 215(2)(b) *must be made with these due process concerns in mind."* Id. at pp. 795-796.

Judge Kilgarlin also noted in connection with the drastic sanction of dismissal:

"These sanctions are termed the 'ultimate' or 'extreme' sanctions. *It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith or due to some fault of the disobedient party* (citing *Societe Internationale Pour Participations Industrielles vs. Rogers*, 357 U.S. 197, 212 (1958) ... Other circumstances may call for the harsh sanction of final dismissal (or sanctions tantamount to final dismissal; but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather thanon the merits it *must exercise caution*". id. at pages 800 and 802.

Moreover Judge Kilgarlin stated that the Court should consider "eventual compliance with the rule ... in devising an appropriate order (imposition sanctions)". id. @ p. 804. It is clear that this Court has unduly and unnecessarily, in violation of the due process rights of these Plaintiffs, taken away their right to have their day in court. Even if it be assumed that Plaintiff should have supplemented Answers 9, 10 and 22 in accordance with the schedule set by the Defendants, the

most that this Court should have done, in imposing sanctions, is to assess attorneys fees against the Plaintiff and his attorney for the time expended by the Defendant in preparing their Motion for Sanctions and attending the hearing on sanctions.

4. Also, considering the affidavit filed by Plaintiffs' counsel and the fact that the Plaintiff himself - that is, the surviving husband - is in the penitentiary and the minor is not at this time living with him, such situation constitutes "good cause" for the failure to file answers to Interrogatories nos. 9, 10 and 22 prior to June 13, 1986. Therefore, the Court erred in imposing the drastic sanctions of dismissal.

5. The Court erred in imposing the drastic sanctions of dismissal because it relied upon an affidavit which was filed *the date of the hearing and of which the Plaintiffs and Plaintiffs' lead counsel*

did not have due notice. The Court should have rejected the filing of said affidavit at the last minute and on the date of said hearing, or continued the hearing to a later date. Particularly is this true since Plaintiffs' lea counsel could not be present due to being in trial in another Court. As the affidavit attached hereto reflects, the counsel who handled the matter, Ms. Susan Ashley, was not familiar enough with the file to be able to respond to such affidavit on the spot. It was totally unfair and lacking in due process for the Court to grant the filing of said affidavit on the date of the hearing without giving the Plaintiff a chance to respond and certainly without giving the Plaintiffs' lead counsel a chance to be there in order to respond. Such action of course not only violated the due process rights of the Plaintiffs but constituted an abuse of discretion in going forward on the basis of such an affidavit. Without

such affidavit, the record in this cause is clearly insufficient to justify the imposition of the drastic sanction of dismissal.

6. For other and sufficient reasons, your Plaintiff would show that the Court erred in imposing the drastic sanction of dismissal.

II.

Therefore, Plaintiffs respectfully request the Court to grant a new trial and reinstate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray the Court to grant such new trial and/or reconsideration and reinstatement of this case upon the Docket.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: _____

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
713/222-2288
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for New Trial with Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant to Rule 215 was mailed to all counsel of record, by placing same in U.S. Mail, postage pre-paid on this the 14th day of July, 1986.

_____

Benton Musslewhite

APPENDIX T

NO. 10-86-176-CV

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT WACO

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

Appellants

vs.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Appellees

*

BRIEF FOR APPELLANTS

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Attorney for Appellants

POINTS OF ERROR

I.

If the District Court was correct in its apparent view that the answers to the three interrogatories in question were somehow deficient, it nevertheless erred in failing to make a specific determination to that effect, specifying how they were deficient and enter a clear order to compel with an opportunity for Plaintiffs to comply, before utilizing the drastic sanctions of dismissal with prejudice.

POINT OF ERROR

II.

The District Court erred in holding, if it did, that the Plaintiffs had not adequately answered the three interrogatories of which Defendants complained, particularly in view of the undisputed facts that Plaintiff (Gary Elliott) provided all the information within his knowledge and the questions

concerning specific acts of negligence were premature, would be better handled by Defendant's special exceptions and, in any event, were answered to the best of Plaintiff's ability pending the depositions of the Defendant doctor and attending nurses.

POINT OF ERROR

III.

The District Court erred in granting the drastic sanction of dismissal with prejudice because:

(a) It is undisputed that with the Plaintiff Gary Elliott being incarcerated in the State Penitentiary, and the other undisputed facts and circumstance of this case, good cause existed for the delay in answering the Hillcrest interrogatories and the Lewin interrogatories, the latter being almost precisely the same as the Hillcrest interrogatories;

(b) It is undisputed that Plaintiffs made a good faith effort to answer all of the interrogatories to the extent of their

knowledge and considering the fact that the depositions of the Defendant doctor and Hospital nurses had not yet been taken;

(c) It is undisputed that Defendants, who apparently were not satisfied with three of the Plaintiffs' answers to their interrogatories, never did ask the Court to determine whether Plaintiffs' answers were, under the circumstances of this case, actually deficient as they contended, and, if the Court deemed them deficient, to enter a clear order to that effect with a reasonable time given Plaintiffs to comply;

(d) It is undisputed that no prior specific order to compel or to require discovery was ever entered by the Court or ever disobeyed by the Plaintiffs;

(e) The Plaintiff filed responses to the interrogatories, responses to the Defendants' sanctions motions, a motion for new trial and presented testimony at the hearing on the Motion for New Trial,

all indicating reasonable explanations why the three questions of which the Defendants complained could not be more completely answered;

(f) The Defendants alternatively sought, yet the Court never considered, lesser sanctions such as attorneys fees and expenses;

(g) At the very most, the Court should have utilized no greater sanction than dismissal without prejudice;

(h) There was absolutely no evidence of bad faith, contumacious conduct, willfulness or gross negligence on the part of Plaintiffs' counsel or any default or neglect on the part of the individual Plaintiffs; and

(i) There was absolutely no evidence of any prejudice to the Defendants by any delay in answering the interrogatories; the case was not set for trial; Plaintiffs offered to supplement (e.g. re experts) the interrogatories as soon as the

depositions of the Defendant Doctor and the Hospital's nurses were completed and as more information became available; and Plaintiffs offered to sign releases and make themselves and all witnesses, including experts, available for depositions long before the trial would be set.

POINT OF ERROR

IV.

The District Court erred in granting the drastic sanction of dismissal with prejudice in this case because such action violated the constitutional rights of the Plaintiffs under the Texas and U.S. Constitutions, particularly the 14th Amendment of the U.S. Constitution, because such sanction was unjust; was not tempered to the alleged abuse, if any; was applied without any prior evidence or finding of bad faith or contumacious conduct on the part of the Plaintiffs or their attorneys; was applied without any

prior clear warning or order of the Court to the Plaintiffs so as to give them a reasonable opportunity to comply with a court order; and for all the reasons asserted in Point III above.

ARGUMENT AND AUTHORITIES

While in this case we do not take the position that interrogatories 9 and 10 called for irrelevant information, we do point to **General Motors Corporation vs. Lawrence** as an indication that the Supreme Court will not tolerate sanctions or even orders to compel answers to questions of which the answering party has no knowledge. This point is made even more clear by the Supreme Court of the United States. In **Societe Internationale Pour Participations Industrielles vs. Williams P. Rogers, Jr., et al.**, 357 U.S. 197 (1958), the Supreme Court made it clear that a party cannot be compelled - and certainly not sanctioned with respect thereto - to produce information of which

it has no knowledge or over which it has no control. The Court held that even where a party has "constructive control" over information or documents, even though it may be a technical violation of the discovery rules not to produce such information or documents, the drastic sanction of dismissal cannot be employed and to do so would violate the constitutional rights of the party against whom it would be employed. See discussion under IV below. In **Hammond Packing Co. vs. Arkansas**, 212 U.S. 322, sanctions were upheld, but the Court went out of its way to make it clear that sanctions cannot be employed ". . ***for a failure to do that which it may not have been in its power to do***". 212 U.S. at 347; emphasis added.

* * *

The lead case in setting the parameters with respect to utilization of the "ultimate sanctions" is **Societe Internationale vs. Rogers**, supra. The

Supreme Court made explained that not only are there constitutional limitations, see discussion under IV., infra, but that the rule itself, as does Rule 215 of T.R.C.P., is subject to important limitations, to wit:

> "In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfullness, bad faith, or any fault of petitioner, (that is the plaintiff himself)".

* * *

EVEN IF THE COURT IMPOSED SANCTIONS WITHIN THE FRAMEWORK OF RULE 215, SUCH IMPOSITION OF SANCTIONS WAS UNCONSTITUTIONAL

As Judge Kilgarlin stated in 15 St. Mary's Law Journal, 795 and 796:

> "Before imposing sanctions for the violation of any discovery request or order, the non-complying party must be given notice and a hearing. Not only are these safeguards required by Rule 215, but due process also demands that the allegedly derelict party be

> afforded reasonable notice and opportunity to be heard before sanctions are invoked. Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee articulated due process requirements that seem applicable to discovery sanction orders in general. Compagnie des Bauxites, it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done be the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2) (b) must be made with these due process concerns in mind.

These due process requirements are affirmed throughout the federal court cases and also the Texas cases. See Affanato vs. Muier Brothers, supra; Fisher vs. Marubeni Cotton Corporation (see discussion under headnote 5); Insurance Corporation of Ireland vs. Compagne des Bauxites de Guinee 456 U.S. 694 (1982);

Hovey vs. Elliott, 147 U.S. 407, (1987); Hammond Packing Co. vs. Arkansas, supra, (see discussion under footnote 9); Societe Internationale vs. Rogers, supra; Lueg Tewell, supra; Plodzik vs. Owens Fiberglass Corporation; Phillips vs. Vinson Supply Co., the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make the necessary corrections, deprived the Appellant of due process and (the Court) abused his discretion in failing to utilize other remedies available to him to assure compliance with the order"; 581 S.W. 2d at p. 792; and Sears Roebuck & Co. vs. Hollingsworth, supra. Indeed, as stated in Insurance Corporation of Ireland vs. Compagne des Bauxites, Rule 37 of the Federal Rules of Civil Procedure establishes the outerlimits of the

constitutional limitation upon sanctions orders. Thus, even if an order complies with Rule 215 of the Texas Rules of Civil Procedure, it violates the due process clause of the Constitution of the United States, if it nevertheless violates Rule 37 F.R.C.P. This becomes important because Rule 37 F.R.C.P., and the cases construing it, mandate that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, in all probability the statement in Rule 215 that a court can impose even the lesser sanctions, without first issuing such a discovery order, violates the constitution of the United States.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the District Court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed facts that the Plaintiffs attempted to respond to the interrogatories; they gave a reasonable explanation as to why there was a delay in responding; they attempted in good faith to answer all the questions to the best of their ability; the Plaintiffs at no time violated any prior order of the Court; the Court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers or by the alleged deficiencies in the answers to interrogatories 9, 10 and 22. What the Court below did reminds us of the

oft-quoted and famous statement of Judge Black's dissent in Link v. Wabash, 370 U.S. 648, as follows:

> "When we allow the desire to reduce Court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name. . . . Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overszealous protection of trial court dockets.

370 U.S. at pp. 648, 649.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Appellants pray that this cause be reversed and remanded to the

District Court for completion of discovery and trial on the merits.

Respectfully submitted,

By: _____

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TBA No. 14752000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was mailed and/or hand delivered to all attorneys of record on this the 26 day of , 1986.

_____

Benton Musslewhite

APPENDIX U

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually And
As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

*

Benton Musslewhite
609 Fannin, Suite 517
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713/222-2288

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually
And As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

COMES NOW, the appellants in the above numbered cause and moves the Court of Appeals for a Rehearing upon their opinion on an Order dated August 13, 1987 and for such Motion would respectfully show the Court:

Your Appellants would respectfully show that the Court of Appeals erred in the following respects:

* * *

V.

The Court of Appeals further erred in failing to decide the question whether or not the District Court had properly tailored the particular sanction used in the case before it. Once again, this Court of Appeals could easily make that determination because it had before it the same record that the District Court had before it, namely the transcript that was before this Court of Appeals. Based upon a review of that transcript it is clear that the District Court did in fact violate the due process rights of the plaintiffs as defined in **Insurance Co. Corporation of Ireland vs. Compagnie-Des Bauxites**, 456 U.S. 694 (1982). After this Court states that it can not determine anything because it has no record before it, it turns right around and states that "the record (apparently before it) reflects that plaintiffs-appellants were given notice of and participated through counsel in the

sanction hearing". If this Court can address the record to make that determinatin, why can it not address the record to determine the other issues which were duly raised by the appellant in this appeal? Therefore, it is clear that when the Court reviewed the record that was before it, being the same record that was before the District Court at the time it made the sanction dismissal, it could only reach one conclusion and that is that the due process rights of the plaintiffs had been indeed completely and utterly violated.

It is clear that we have a situation here, when reduced to its simple essence whereby the plaintiffs answered the interrogatories submitted to them; the defendants complained that three of the interrogatories submitted to them had not been answered completely; the plaintiffs made it clear in supplemental answers and in answers to interrogatories submitted by

a co-defendant that they had answered those interrogatories ot the best of their ability and that they had given all the information that they had in their possession; that the case had not been set for trial; that the Court has not entered any prior order specifically directing the plaintiffs to answer such interrogatories more fully or else be subject to sanctions; the Court had not considered the question of whether or not the answers to the interrogatories were adequate; there was absolutely no showing of prejudice that could be sustained by the defendants by the delay in answering the interrogatories or by the fact that they had not been answered as fully as defendants would like; the defendants had made no effort whatsoever to mitigate any possible prejudice by taking the depositions of the parties or sending out interrogatories to the in-laws of the plaintiff Gary Elliott who was

incarcerated in the penitentiary; the District Court clearly failed and refused to take into consideration that the Plaintiff was incarcerated inhe penitentiary and alienated from the in-laws who had custody of his child; and that there was absolutely no evidence, pleadings, or otherwise, in the record before the District Court, being the same record that was before the Court of Appeals, which would indicate in any way that the plaintiffs or their attorneys were guilty of bad faith or acting willfully. Affirming a dismissal under those circumstances is but a further extensin of the violation of due process and erroneous application of the Rules of Civil Procedure that had been effectuated by the District Court. We respectfully request this Honorable Court to reconsider its decision; to grant a rehearing; and reverse the District Court below and Order this Court restated for completion of

discovery and trial upon the merits.

Respectfully submitted,

THE LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: _____

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APPENDIX V

NO. C-6869

IN THE
SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIED OF
SHAUNA MARIE ELLIOTT, A MINOR CHILD,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

AMENDED
PETITION FOR WRIT OF ERROR

On behalf of GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR, Appellants in Cause No. 10-86-176-CV in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, Texas, wherein GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIED OF SHAUNA MARIE ELLIOTT, A MINOR, are Appellants and Dr. Marcial Lewin and Hillcrest Baptist Medical Center are Appellees.

BENTON MUSSLEWHITE
609 Fannin, Ste. 517
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(713) 222-2288
Attorney for Petitioners

NO. C-6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

AMENDED PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

On behalf of GARY ELLIOTT, Individually, and as next friend of SHAUNA MARIE ELLIOTT, A Minor, Petitioners herein, Petition for Writ of Error is sought with respect to Cause No. 10-86-176-CV in the Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco, wherein GARY ELLIOTT, Individually, and as next of friend of SHAUNA MARIE ELLIOTT, A Minor, were

Appellants and Dr. Marcial Lewin and Hillcrest Medical Center were Appellees. As stated above, this instrument is an application for Writ of Error. The attorney for the Petitioners is Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002, (713)222-2288, TBA # 14752000. This Application for Writ of Error is being filed on this 26th day of October, 1987.

* * *

In addition, with respect to subsection a(3), Section 22.001, Petitioners would show that this case involves construction of Rule 215 of T.R.C.P. concerning sanctions dismissals and a construction of various constitutional provisions such as the 5th and 14th Amendments to the Constitution of the United States, involving due process. In particular, this case involves the important question of whether or not Rule 215 allows a

dismissal with prejudice of a case where the plaintiffs have attempted to answer the interrogatories in question; disclosed all the information that they had knowledge of or could reasonably find out; there was no allegation of any prejudice to the defendants which would arise froma refusal to dismiss with prejudice; there were not allegations of any bad faith of contumacious conduct on the part of the plaintiffs or their attorneys; the drastic sanction of dismissal was obtained without defendants first obtaining an order compelling discovery or a specific order of discovery; and there was no showing of any violation of a prior discovery order.

Subsection a(6) of Section 22.001 also supports jurisdicti before the Court because all of the rrors complained of in this case are rrors of substantive law which have tremendous importance to the law of this state. This is true for four primary reasons:

(a). The Court of Appeals incorrectly held that the appeal could not be resolved on the basis of the Transcript even though no evidence was offered at the hearing on sanctions other than the affidavit of counsel for Respondent Hillcrest, which affidavit stated was, according to hillcrest, consistent with the statement of facts contained in its Brief before the Court of Appeals; the Transcript disclosed that no party had alleged bad faith or contumacious conduct on the part of Plaintiffs or that Defendants had been prejudiced, thus the Motions for Sanctions did not support the drastic sanction of dismissal; the Transcript disclosed that no prior discovery order had been issued or violated by Plaintiffs; the Transcript disclosed that Plaintiffs has made a good faith effort to answer the three interrogatory answers complained of; and the Defendants did not dispute Plaintiffs

statement of those facts in their briefs before the Court of Appeals in any material respect.

(b.) In holding, by implication, that the facts of this case justified the drastic sanction of dismissal with prejudice.

(c.) In holding, by implication, that the district court should not have first issued a discovery order or at least resorted to lesser sanctions in view of the fact that no prior discovery order had been violated; good faith effort to comply with the discovery requests had been made; and no prejudice had been shown.

(d). And in holding, by implication, that the district court, in dismissing with prejudice, had not violated the Plaintiffs' due process rights under the U.S. Constitution, particularly the 5th and 14th Amendments.

POINTS OF ERROR

I.

The Court of Appeals erred in failing to decide the matters of the appel on the basis of the Transcript, because no evidence other than an affidavit tendered by the Defendants' counsel was offered at the sanctions hearing, which affidavit Respondents stated was consistent with their statement of the facts in their Brief before the Court of Appeals; the Transcript conclusively established that the action of the district court in granting the ultimate sanctin of dismissal with prejudice was erroneous; the "pleadings" (motions for sanctions) of the Defendants, which were in the Transcript, did not allege sufficient grounds for the granting of the ultimate sanction; and the Defendants, in their Briefs before the Court of Appeals, did not contradict the Plaintiffs' statement of the facts in their Brief on appeal in any material respect. (Germane to assignments of Error Nos. I, II, III and IV of Motion for Rehearing.)

II.

The Court of Appeals erred in impliedly upholding the action of the district court in granting the most drastic sanction of all, dismissal with prejudice, because no bad faith or contumacious conduct had been alleged or shown; no prejudice to Defendants has been alleged or shown; Plaintiffs respo ded in good faith to the interrogatories in question, to the best of their ability to do so; Plaintiffs attended all arings set by the district court; the case was not set for trial; and

Defendants had not attempted, prior to seeking dismissal, to have the district court determine whether the Plaintiffs should be ordered to take any further action with respect to the three interrogatories which Plaintiffs had attempted to answer but Defendants still complaed of. (Germane to Assignments of Error Nos. III, IV and V of Motion for Rehearing.)

III.

The Court of Appeals' implied decision, upholding the district court's dismissal with prejudice, erroneously permits the violatinof Plaintiffs' constitutional rights, particularly their rights under the 5th and 14th Amendments to the Constitution of the U.S. (Germane to Assignment of Error No. IV. of Motion for Rehearing.)

* * *

(3). Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it is unconstitutional.

As Judge Kilgarlin stated in St. Mary's Law Journal, 795 and 796:

"Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp of Ireland v. Companies des Bauxites de Guinee articulated due process requirements that seem applicable to

disocvery sanction orders in general. Compagnie des Bauxites, it is submitted, holds for a sanctin decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery aubse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2)(b) must be made with these due process concerns in mind." (Emphasis ours).

These due process requirements are affirmed throughout the federal and Texas cases. See *Affanato v. Mel Brothers, supra; Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338 (8 Cir. 1975) (see discussion under headnote 5); *Insurance Corp. of Ireland v. Compagne des Bauxites de Guinee*, 456 U.S. 694 (1982); *Hovey v. Elliott*, 147 U.S. 407 (1897); *Hammond Packing Co. v. Arkansas, supra; Societe Internationale v. Rogers, supra; Luep v. Tewell*, 572 S.W.2d 102 (Ct. of App.); *Plodzik v. Owen Fiberglass Corp.*, 549 S.W.2d 52 (Ct. of App, Austin 1977);

Phillips v. Vinson Petroleum Supply Co., (the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make necessary corrections, deprived the Appellant of due process and abused his discretion in failing to utilize other remedies available to him to assure complaince with the order", 581 S.W.2d at p. 792.); and *Sears Roebuck & Co. v. Holingsworth, supra.* Indeed, as stated in *Insurance Corp. of Ireland v. Compagne de Bauxities,* Rule 37, of the F.R.C.P., establishes the outer limits of the constitutional restrictions upon sanctions orders. Ths, evenif an order complies with Rule 215 of the T.R.C.P., as construed by the district court in this case, it violates the due process clause of the Constitution of the United States if it nevertheless violates Rule 37 of the

F.R.C.P. This becomes important because Rule 37 of the F.R.C.P. and the cases construing it, mandates that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, it is quite possible that the statement in Rule 215 that a court can impose sanctions (including, impliedly, the ultimate sanction) witout first issuing such a discovery order, vioaltes the Constitution of the United States.

CONCUSION AND PRAYER

We respectfully suggest that grant of Writ of Error in this case is vital to the continued efficacy of Rule 215. We state once again that the Court should provide the district courts with more definite

parameters to guide them in the future in the use of their discretion under Rule 215.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the district court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed procedural facts that the Petitoners attempted in good faith to answer all the interrogatories to the best of their ability to do so; they at not time violated any prior order of the Court; the district court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers to interrogatories 9, 10 and 22. ....

* * *

WHEREFORE PREMISES CONSIDERED, Petitioners pray this Court grant Writ of Error and upon hearing reverse and remand this case to the District Court for trial on ther merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition for Writ of Error was served upon all attorneys of record, by Certified Mail, Return Receipt Requested or by hand delivery, on this 26th day of October, 1987.

Benton Musslewhite

APPENDIX W

NO. C 6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

MOTION FOR REHEARING AND RECONSIDERATION
OF PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, the Petitioners and move the Honorable Court for a rehearing and reconsideration of the Petitioner's Petition for Writ of Error and for such Motion would show:

I.

Petitioners admit technically they were

late in filing answers to Respondents' interrogatories. But is is undisputed that they were filed, about seven months before the sanctions hearing in questin was conducted. Between the date they were filed and the sanctins hearing, that seven month period, *only* the following happened:

(a). The Respondents complained of only three interrogatory answers.

(b). The Petitioners made it further clear that ehy simply did not know the answers to two of the interrogatories and supplemented their answers to the third by listing the specific acts of negligence (even though the third - was a question askng for Plaintiffs' specific grounds of negligence - was premature and should have been handled by a hearing on special exceptions and Plaintiffs were about to take the depositions of the doctors and hospital personnel, which would have enabled Plaintiffs to accurately list the specific acts of negligence).

(c). Petitioners adequately explained the delay in answering the interrogatories - the adult Petitioner was in the state penitentiary all through the litigaton and it had been difficult to get the answers completed.

(d). Respondents attempted no further discovery.

(e). Respondents did not ask for a hearing to determine whether the three interrogatory answers were inadequate and no such hearing was held.

(f). The Court had not set any discovery deadlines.

(g). The case was not set for trial.

(h). The Court had issued no discovery orders of any kind.

(i). No motion to compel had been filed and no order to compel had been issued.

(j). The Petitioners had not missed any hearings and attended the sanctions hearing in question.

(k). Petitiors filed a written

response to Respondents' Motion for Sanctions.

(l). Petitioners had noticed and scheduled the depositions of the Defendant Doctor and Personnel at the Defendant hospital.

(m). Petitioners had (in their response) agreed to a self-imposed deadline - even though none had been imposed by the Court - of providing Respondents with the names of their experts.

(n). Nothing ***else*** - but the alleged failure to answer interrogatories constituted the basis for the Respondents' Motion for Sanctions and, as stated above by the time of the sanctions hearing, Petitioners had answered ***all*** but two of the interrogatories and did not answer those because they ***simply did not know the answers to the questions asked.***

(o). ***All of the foregoing was indisputably established in the Transcript***

before the Court of Appeals. The Transcript was certified as complete by the Clerk. See Transcript.

* * *

III.

Thus, with these undisputed certainties, it is clear that the Writ of Error should be granted, and at the least a per curiam decision entered, for the following reasons:

(a). The pleadings (Motion for Sanctions) were limited to a request for sanctions based *solely* upon the alleged failure to answer the interrogatories, which interrogatories, and the answers thereto, were in the Transcript. Therefore, the action of the District Court was limited to the allegations in the motions and, since those allegations, as a matter of law, did not support the snactin of dismissal (considering that answers were filed as established by the Transcript), the Court of Appeals did not

need a statement of facts in order to consider the merits of the appeal and to reverse. **Weatherell v. Weatherell**, 403 S.W.2d 347 (Ct. of App., Houston 1966); **McEntire v. McEntire**, 706 S.W.2d 347 (Ct. of App. 1986); **DeGarcia v. San Antonio & S.P. Ry. Co.**, 77 S.W. 275 (Ct. of App., San Antonio, 1915; writ ref.); 4 Tex. Jur. 3d, Sect. 349, at pp. 479, 480, and the cases there cited. See also pp. 22, 27 of Petition for Writ of Error.

(b) The briefs before the Court of Appeals established that there was no dispute about the material "facts" and that all of such material "facts" were contained in the Transcript. Thus, the Court of Appeals did not need a statement of facts in order to consider the merits of the appeal and to reverse. **Whatley v. Whatley**, 493 S.W.2d 299 (Ct. of App., Dallas, 1973); **Sarri v. Christie**, 217 S.W.2d 99 (Ct. of App., Dallas 1949); **Johnson v. Texas Board of Chiropractic**

Examiners, 449 S.W.2d 145 (Tex. Civ.App. Amarillo 1969, no writ); City of Houston v. Lakewood Estates, Inc., 429 S.W.2d 938 (Tex Civ App., Houston 1st Dist., 1968, writ ref'd n.r.e.); American Security Life Ins. Co. v. M. D. Anderson Hospital and Tumor Institute, 408 S.W.2d 155 (Tex. Civ. App., Houston 1st Dist. 1966, writ dismissed); Rancher v. Franks, 269 S.W.2d (Tex. Civ.App. Fort Worth 1954, no writ) and see pp. 20-22 of Petition for Writ of Error.

(c). The District Court's order by limiting the grounds for dismissal to discovery abuse, which in turn necessarily turned on the discovery requests in the Transcript, could be considered on its merits *solely* from the Transcript, without a statement of facts, and the Court of Appeals should have reversed on the basis of the terms of the order, in the light of the Transcript, because the order and the Transcript did not support the drastic

sanction of dismissal, see pp. 23-25 of Petition and the cases there cited.

(d). The failure to consider the Petitioners' appeal on its merits constituted a violation of the Rules of Civil and Appellate Procedure, the Texas Constitution, the United States Constitution and existing case law.

(e). On the merits, resort to the drastic sanction of dismissal violates Rules 215 and other rules of the Texas Rules of Civil Procedure and existing case law.

(f). If such action does not violate Rule 215 T.R.C.P. by permitting dismissals where answers to interrogatories have been filed, where no prior order of discovery has been violated, where and when there is no allegation of bad faith of contumacious conduct - then either Rule 215 is unconstitutional under the Constitution of the United States or the dismissal is, in itself, a deprivation of due process and

thus a violation of the United States Constitution. See **Societe Internationale Pour Participations INdustrialies v. Rogers**, 357 U.S. 199 (1958).

What the bottom line is in this case is whether this Court, the highest court of our state, is going to tolerate the stripping of the minor child's sacred rights to a trial by jury simply because, throught no fault of her, her only surviving parent is incarcerated int he state penitentiary and thus unable to respond to interogatories expeditiously and to answer two questions which he did not know the answers to and, because he was incarcertated, could not go out and try to find out the answers to those two questions. That is the sum and substance of all that the District Court - based upon the Motions for Sanctions, the Transcript and its own order - could possibly have based its **dismissal with prejudice on.**

* * *

WHEREFORE, we pray this Court to right this terrible wrong and rehear and reconsider the Petition for Writ of Error in this case and grant such Petition or enter a per curiam opinion ordering the Court of Appeals to consider the appeal on its merits.

Respectfully submitted,

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